	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit—Continued		
Appendix of defendants-appellees, Select Operating Corporation and United Booking Office, Inc.	91	83
Notice of motion for an order dismissing action	92	83
Affidavit of Jacob J. Shubert	95	86
Exhibit "C"—Letter dated March 2, 1959 from Harold E. Kohn to Hon. C. William Kraft, Jr.	105	94
Supplemental affidavit of Jacob J. Shubert	106	95
Order dismissing action	108	96
Opinion, per curiam, of the United States Court of Appeals for the Second Circuit of December 21, 1959	110	98
Opinion, per curiam, of the United States Court of Appeals for the Second Circuit of January 18, 1960	114	101
Opinion, Moore, J.	117	103
Opinion dissenting in part, Hincks, J.	132	115
Judgments	138	120
Clerk's certificate (omitted in printing)	140	121
Order allowing certiorari	141	121

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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 101

GOLDLAWR, INC., PETITIONER,

vs.

MARCUS HEIMAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 19, 1961

CERTIORARI GRANTED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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GOLDLAWR, INC., PETITIONER,

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit		
Appendix to appellant's brief consisting of proceedings in the United States District Courts for the Eastern District of Pennsylvania and the Southern District of New York		
Docket entries filed E.D. Pa., No. 21506	1	1
Docket entries filed in S.D. N.Y., No. 144-244	4	5
Docket entries filed in E.D. Pa., No. 22,092	8	7
Docket entries filed in S.D. N.Y., No. 144-243	11	10
Amended complaint filed in E.D. Pa., No. 21,506	15	13
Summons issued by E.D. Pa. in Goldlawr, Inc. v. Jacob J. Shubert, et al.	19a	18
Alias Summons issued by E.D. Pa. in Goldlawr, Inc. v. United Booking Office, Inc.	19c	19

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 14, 1961

	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit—Continued		
Appendix to appellant's brief consisting of proceedings in the United States District Courts for the Eastern District of Pennsylvania and the Southern District of New York—Continued		
Complaint filed in E.D. Pa., No. 22,092	20	21
Opinion Kraft, J., filed in E.D. Pa., Nos. 21,506 and 22,092	25	25
Order to transfer in E.D. Pa., No. 21,506	46	46
Order to transfer in E.D. Pa., No. 22,092	47	46
Amended complaint filed in S.D. N.Y., No. 144-243	48	47
Amended complaint filed in S.D. N.Y., No. 144-244	55	53
Notice of motion under Rule 25(a) (1) filed in S.D. N.Y.	62	59
Opinion (both appeals—Nos. 144-243 and 144-244) in S.D. N.Y., Palmieri, J.	64	60
Order (both appeals—Nos. 144-243 and 144-244) in S.D. N.Y.	71	66
Appendix to appellees' brief (Morgan Guaranty Trust Company of New York and Asher Levy, Executors of the Estate of Marcus Heiman, deceased)	73	67
Notice of cross-motion dated June 4, 1958 of Morgan Guaranty Trust Company of New York and Asher Levy, Executors of Estate of Marcus Heiman to dismiss filed in S.D. N.Y.	73a	68
Affidavit of Arnold Lewis	76	70
Affidavit of Aaron Lipper	78	71
Affidavit of Marcus Heiman	83a	76
Reply affidavit of Aaron Lipper	84	77
Portion of affidavit of Harold Kohn, submitted in opposition to cross-motion of Executors and in support of motions for substitution	89	81
Exhibit "B-1" Summons issued by E.D. Pa. in Goldlawr, Inc. v. United Booking Office, Inc.	90	82

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 26211, 26212

GOLDLAWR, INC., Plaintiff-Appellant,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants-Appellees,

and

MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, Defendants.

Appellant's Appendix

[fol. 1]

RELEVANT DOCKET ENTRIES

(Appeal No. 26,212)

(E. D. Pa. action #21,506 and S. D. N. Y. action #144-244)

DOCKET ENTRIES FILED IN E. D. PA. No. 21,506

Oct. 17, 1956.	Complaint filed.
Oct. 17, 1956.	Summons exit.
Nov. 21, 1956.	Summons returned showing service made thereof, and filed.
Nov. 26, 1956.	Defendants' motion to dismiss for improper venue, filed.
Nov. 26, 1956.	Defendants' motion to quash return of service and to dismiss action, filed.
Nov. 26, 1956.	Affidavits in support of motion to dismiss, filed.
Jan. 7, 1957.	Plaintiff's request to place certain motions on Argument List, filed.

Feb. 19, 1957. Praecipe for alias summons, filed.

Feb. 19, 1957. Alias Summons exit.

Mar. 8, 1957. Alias summons returned by U.S. Marshal, S. D. N. Y. "on February 28, 1957, served Select Theatres Corp. and Select Operating Corp." and filed. As to United Booking Office, Inc. "not found."

Mar. 12, 1957. Praecipe to issue Alias Summons as to United Booking Office, Inc. filed.

Mar. 12, 1957. Alias Summons as to United Booking Office, Inc. exit.

[fol. 2]

Mar. 20, 1957. Defendants Select Theatres Corp. and Select Operating Corporation's motion to quash returns of service of alias summons and to dismiss for lack of jurisdiction and improper venue, filed.

Mar. 20, 1957. Affidavit of John Shubert, filed.

Mar. 26, 1957. Alias Summons as to United Booking Office, Inc. returned "on March 19, 1957 served", and filed.

Mar. 28, 1957. Transcript of hearing of 2/18/57 before Van Dusen, J. filed.

Apr. 1, 1957. Motion of United Booking, Inc. to quash return of service of alias summons and to dismiss for lack of jurisdiction and improper venue, filed.

June 19, 1957. Affidavit of Harold E. Kohn, filed.

June 19, 1957. Affidavit of John Shubert, filed.

June 19, 1957. Affidavit of Sidney D. Mandel, filed.

June 19, 1957. Affidavit of Sidney D. Mandel, filed.

June 25, 1957. Hearing sur motions to dismiss for improper venue and to quash returns of service and to dismiss for lack of jurisdic-

tion; sur motions of certain defendants for summary judgment; sur defendants' motions to strike. C. A. V. Kraft

July 26, 1957. Transcript of hearing of 6/25/57 before Kraft, J. filed.

Dec. 22, 1958. Opinion denying motions of Lawrence, J. J. Shubert, individually, and Select Theatres Corp., and granting motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, individually, [fol. 3] and of Select Operating Corp., and United Booking Office, Inc., to dismiss for improper venue; GRANTING motions of Lawrence Shubert Lawrence, et al., Trustees, and DENYING motions of Select Theatre Corp. and J. J. Shubert, to quash service and dismiss for lack of jurisdiction over the person; GRANTING leave to amend complaint against Lawrence; GRANTING motions to vacate joinder and to dismiss third party complaint, and GRANTING motions to strike paragraphs 9 and 10 of complaint, filed. Kraft

Mar. 2, 1959. Defs' petition for rehearing re: findings of opinion of 12/22/58, filed (filed with Judge Kraft on 1/27/59.)

Mar. 2, 1959. Order of Court denying motions of Lawrence S. Lawrence and J. J. Shubert to dismiss for improper venue; reserving decisions on motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman as individuals and United Booking Office, Inc. and Select Operating Corporation to dismiss for improper venue; denying motions of Select Theatres Corp. to dismiss for improper venue, Granting Motion of Lawrence S. Lawrence, Milton Shubert, William Klein and Sylvia W. Golde, as Trustees of the Estate of Lee

Shubert, Deceased, to quash return of service and to dismiss for lack of jurisdiction; denying motions of Select Theatres Corp. and J. J. Shubert to quash returns of service and to dismiss for lack of juris- [fol. 4] diction; granting plaintiff's motion for leave to amend complaint against Lawrence S. Lawrence etc.; Granting plaintiff's motion to vacate Order permitting joinder of Third-Party Defendants and to Dismiss Third-Party Complaint; and granting motions of remaining defendants to strike paragraphs 9 and 10 from complaint and striking said paragraphs without prejudice, filed 3/3/59. Noted and Notice Mailed. Kraft

Mar. 3, 1959. Order of Court directing Transfer of case as against following defendants: Select Operating Corp., United Booking Office, Inc., Marcus Heiman, Milton Shubert, William Klein, and Sylvia W. Golde, as individuals, to the U. S. District Court of Southern District of New York, and denying motions of said defendants to dismiss for improper venue, filed. 3/3/59 Noted and Notice Mailed. Kraft

Mar. 3, 1959. Affidavit of Aaron Lipper, filed. [re death of Marcus Heiman.]

Mar. 3, 1959. Plaintiff's motion to transfer as to certain defendants, filed (Filed with Judge Kraft on 1/20/59).

Mar. 6, 1959. Amended complaint filed (Lodged in Clerk's office on 2/15/57).

Mar. 20, 1959. List of Documents plaintiff suggests should be transferred to N. Y. filed.

Jo

DOCKET ENTRIES FILED IN S. D. N. Y. No. 144-244

Mar. 26, 1959. Filed papers, together with certified copy of docket entries and order of transfer, transferred from U. S. D. C. Eastern District of Pa.

[fol. 5]

Mar. 31, 1959. Filed Notice of appearance of attys for pltff.

May 5, 1959. Filed Amended Complaint and issued summons.

May 14, 1959. Filed notice of motion to substitute Executors, etc. Ret. 5/21/59.

May 26, 1959. Filed affdvt and Notice of Motion to Dismiss etc. [on behalf of Select Operating Corp. and United Booking Office, Inc.] Ret. 6/16/59.

June 8, 1959. Filed affdvt and Cross-Motion to dismiss action as to deft Marcus Heiman, etc. Ret. 6/18/59 (filed Civil 144-243).

June 24, 1959. Above entitled action referred to Judge Palmieri, for all purposes Ryan, J. Mailed notice of entry 6/25/59 (filed Civil 144-243).

May 14, 1959. Filed notice of motion under rule 25(a)(1)-ret. 5/21/59 [proof of service].

Aug. 10, 1959. Filed Opinion #25,346. Improperly transferred from Penna. as to defts Select Operating and United Booking Office, action must be dismissed. See opinion re: motion and Cross-motion as to deft Heiman. Settle orders for dismissal as to defts Select Operating, United Booking Office and Marcus Heiman and for consolidation of actions vs. Milton Shubert, Wm. Klein and Sylvia W. Golde. Palmieri, J.

Aug. 10, 1959. Filed deft Heiman's supplemental affdvt (Filed Civ. 144-243).

[fol. 6]

Aug. 10, 1959. Filed pltff's affdvt of service [Affidavit of plaintiff's attorney in opposition to motions to dismiss] (Filed Civ. 144-243).

Aug. 10, 1959. Filed supplemental affdvt [on behalf of defts Select Operating Corp. and United Booking Office, Inc.].

Sept. 1, 1959. Filed Order granting motions of defts Select Operating Corp. and United Booking Office, Inc. to dismiss complaint etc. That motion of executors of Estate of Marcus Heiman to dismiss be granted, etc. That judgment be entered as to Select Operating Corp., United Booking Office, Inc. and Marcus Heiman—that Action 144-243 and 144-244 be consolidated under No. 144-243, for all purposes etc. Palmieri, J. Judgment entered . . . Clerk . . . Mailed notice of entry 9/2/59 (Filed Civ. 144-243).

Sept. 25, 1959. Filed notice of appeal and mailed copies to Schoenfeld & Jacobs; Donovan, Leisure, Newton & Irvine; Hess, Mela, Segall, Popkin & Guterman; Perkins, Daniels, McCormack & Collins and Lipper, Shinn & Keeley on 9/28/59.

Jan. 19, 1960. Filed certified copy of USCA order—dismissing appeal. Mailed notice of entry 1/19/60.

Feb. 4, 1960. Mandate returned to USCA for correction (Filed Civ. 144-243).

Feb. 16, 1960. Filed corrected true copy of USCA order with copy of USCA opinion annexed denying petition for rehearing, vacating judgment of USDC dated 9/1/59 in accordance with this opinion (attached to copy filed 1/19/60 Filed Civ. 144-243).

[fol. 7]

Mar. 9, 1960. Filed notice of appeal—copies mailed—Civ. 144-243 (Schoenfeld & Jacobs; Donovan, Leisure, Newton & Irvine; Hess, Mela, Segall, Popkin & Guterman; Perkins, Daniels, McCormack & Collins; Lipper, Shinn & Keeley).

Mar. 9, 1960. Filed appeal bond—Fidelity & Deposit Co. of Md.

Apr. 4, 1960. Filed stip. for record on appeal (re omitting papers indicated).

[fol. 8] (Appeal No. 26,211)

(E. D. Pa. action #22,092 and S. D. N. Y. action #144-243)

DOCKET ENTRIES FILED IN E. D. PA. No. 22,092

Feb. 18, 1957. Complaint filed.

Feb. 18, 1957. Summons exit.

Mar. 11, 1957. Summons with returns filed. Not found as to United Booking Office, Inc.

Mar. 12, 1957. Praecipe to issue Alias Summons to United Booking Office, Inc. filed.

Mar. 12, 1957. Alias Summons exit.

Mar. 20, 1957. Defendants' motion to quash returns of service and to dismiss for lack of jurisdiction, filed.

Mar. 20, 1957. Defendants' motion to dismiss for improper venue, filed.

Mar. 20, 1957. Affidavits of John Shubert, et al., filed.

Mar. 26, 1957. Alias Summons as to United Booking Office, Inc. returned by U. S. Marshal S. D. N. Y. "on March 19, 1957 served" and filed.

Apr. 1, 1957. Motion of United Booking Office, Inc. to quash return of service of alias summons and to dismiss for lack of jurisdiction, etc. filed.

June 19, 1957. Affidavit of Harold E. Kohn, filed (C. A. 21,506).

June 19, 1957. Affidavit of John Shubert, filed (C. A. 21,506).

[fol. 9]

June 19, 1957. Affidavit of Sidney D. Mandel, filed (C. A. 21,506).

June 19, 1957. Affidavit of Sidney D. Mandel, filed (C. A. 21,506).

June 25, 1957. Hearing sur motions to dismiss for improper venue and to quash returns of service and to dismiss for lack of jurisdiction; sur plaintiff's motion to vacate ex parte order joining third-party defendants and third-party defendants' motion to vacate third-party complaint; sur defendants' motion to strike paragraphs 9 & 10 of the complaint. C. A. V. Kraft

July 26, 1957. Transcript of hearing of 6/25/57 before Kraft, J. filed (C. A. 21,506)

Dec. 22, 1958. Opinion denying motions of Lawrence, J. J. Shubert, individually and Select Theatres Corp., and granting motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, Select Operating Corp. and United Booking Office, Inc. to dismiss for improper venue, GRANTING motions of Lawrence S. Lawrence, et al., Trustees, and DENYING motions of Select Theatres Corp., J. J. Shubert, John Shubert to quash and dismiss for lack of jurisdiction over the persons; DENYING motions of Barrymore Theatre Corp., Modern Theatre Corp. and Lawrence for summary judgment, GRANTING motions to vacate joinder and to dismiss third party complaint, and GRANTING motions to strike paragraphs 9 & 10 of the complaint, filed. Kraft

[fol. 10]

Mar. 2, 1959. Defendants' petition for rehearing re: findings of Opinion of 12/22/58, filed (filed with Judge Kraft on 1/27/59) (C. A. 21,506)

Mar. 2, 1959. Order of Court denying motions of Lawrence S. Lawrence, J. J. Shubert and John Shubert to dismiss for improper venue; reserving decisions on motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman as individuals and United Booking Office, Inc. and Select Operating Corp. to dismiss for improper venue; denying motion of Select Theatres Corp. to dismiss for improper venue; granting motion of Lawrence S. Lawrence, Milton Shubert, William Klein and Sylvia W. Golde, as Trustees of the Estate of Lee Shubert, Deceased, to quash return of service and to dismiss for lack of jurisdiction; denying motions of Barrymore Theatre Corp., Modern Theatre Corp. and Lawrence S. Lawrence for summary judgment, without prejudice; Granting plaintiff's motion to vacate Order of joinder and Granting motions of remaining defendants to strike paragraphs 9 & 10 from the complaint and striking said paragraphs, without prejudice, filed. 3/3/59 Noted & Notice Mailed. Kraft

Mar. 3, 1959. Order of Court directing Transfer of cases against following defendants: Select Operating Corp., United Booking Office, Inc., Marcus Heiman, Milton Shubert, William Klein and Sylvia W. Golde as individuals to the U. S. District Court [fol. 11] of Southern District of New York and denying motions of said defendants to dismiss for improper venue, filed. 3/3/59 Noted & Notice mailed. Kraft

Mar. 3, 1959. Affidavit of Aaron Lipper, filed. [re death of Marcus Heiman] (C. A. 21,506)

Mar. 3, 1959. Plaintiff's motion to transfer as to certain defendants filed (C. A. 21,506) (filed with Judge Kraft on 1/20/59)

Mar. 20, 1959. List of documents plaintiff suggests should be transferred to New York, filed.

DOCKET ENTRIES FILED IN S. D. N. Y. No. 144-243

Mar. 26, 1959. Filed papers, together with certified copy of docket entries and order of transfer, transferred from U. S. D. C., E. D. Pa.

Mar. 31, 1959. Filed notice of appearance for pltff.

May 5, 1959. Filed amended complaint and issued summons.

May 14, 1959. Filed affdvt & notice of motion—substitute executors in place of Marcus Heiman as defts.—ret. 5/21/59

May 26, 1959. Filed affdvt and notice of motion to dismiss etc. [on behalf of Select Operating Corp. and United Booking Office, Inc.] Ret. 6/16/59

June 8, 1959. Filed affdvt & notice of motion to dismiss etc. as to deft Marcus Heiman ret. 6/18/59

June 24, 1959. Filed order referring to Judge Palmieri for all purposes.—Ryan, J. Mailed notice 6/25/59

[fol. 12]

Aug. 10, 1959. Filed Opinion #25,346. Improperly transferred from Penna as to defts Select Operating & United Booking Office, action must be dismissed. See opinion re: motion & cross-motion as to deft. Heiman. Settle orders for dismissal as to defts Select Operating, United Booking Office

& Marcus Heiman and for consolidation of actions vs. Milton Shubert, Wm. Klein & Sylvia W. Golde—Palmieri, J.

Aug. 10, 1959. Filed pltff's affdvt of service [Affidavit of plaintiff's attorney in opposition to motions to dismiss. Civ. Act. No. 144-243]

Aug. 10, 1959. Filed pltff's affdvt of service [Affidavit of plaintiff's attorney in opposition to motions to dismiss. Civ. Act. No. 144-244]

Aug. 10, 1959. Filed deft Heiman's supplemental affdvt.

Aug. 10, 1959. Filed defts Select, etc. supplemental affdvt.

Sept. 1, 1959. Filed order—motions of defts Select Operating & United Booking Office to dismiss granted; motion to dismiss as to Heiman granted, etc.; Judgment directed to be entered favor Select, United Booking & Heiman; Civ. 144-244 consolidated with this action for all purposes, etc.—Palmieri, J. Judgment entered favor defts Select Operating Corp. United Booking Office, Inc. and Marcus Heiman—Clerk—Mailed notice of entry 9/2/59.

Sept. 25, 1959. Filed notice of appeal—Mailed copies to Gerald Schoenfeld & Bernard B. Jacobs, Esqs.; Donovan, Leisure, Newton & Irvine, Esqs.; Hess, Mela, Segall, Pop- [fol. 13] kin & Guterman, Esqs.; Perkins, Daniels, McCormack & Collins, Esqs.; and Lipper, Shinn & Keeley, Esqs.; Dilworth, Paxson, Kalish, Kohn & Dilks, Esqs. of counsel, Phila., Pa.

Jan. 19, 1960. Filed true copy of USCA order with copy of opinion attached granting motions and dismissing appeal from judgment of district court—mailed notice.

Jan. 27, 1960. Filed opinion #25,693. Plaintiff's request for statement under 28 USC 1292(b) should be granted, etc.—Palmieri, J.—mailed notice of entry 1/27/60

Jan. 27, 1960. Filed order—Judgment of 9/1/59 dismissing as to Select, United and Heiman vacated for purpose of permitting Judge Palmieri to enter fresh decree, etc.—Palmieri, J. (mailed notice of entry 1/7/60)

Jan. 27, 1960. Filed order and decree granting motions of defendants Select, United and Heiman to dismiss for lack of jurisdiction—Palmieri, J.—mailed notice of entry 1/27/60

Feb. 4, 1960. Mandate returned to USCA for correction.

Feb. 16, 1960. Filed corrected true copy of USCA order with copy of USCA opinion annexed denying petition for rehearing and vacating judgment of district court dated 9/1/59 in accordance with this opinion—(attached to copy filed 1/19/60)

Mar. 9, 1960. Filed bond undertaking for costs on appeal—Fidelity & Deposit Co.

[fol. 14]

Mar. 9, 1960. Filed notice of appeal—Mailed copies to Gerald Schoenfeld, & Bernard B. Jacobs, Esqs.; Donovan, Leisure, Newton & Irvine, Esqs.; Hess Mela, Segall, Popkin & Guterman, Esqs.; Popkin, Daniels, McCormack & Collins, Esqs.; Lipper, Shinn & Keeley, Esqs.

Mar. 19, 1960. Filed copy of amended complaint for the Eastern District of Pennsylvania.

Apr. 4, 1960. Filed stipulation for record on appeal.

Apr. 8, 1960. Certified record on appeal to USCA.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No. 21,506

GOLDLAWR, INCORPORATED, Plaintiff,

v.

JACOB J. SHUBERT and LAWRENCE SHUBERT LAWRENCE, MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, Individually and as Trustees of the Estate of Lee Shubert, Deceased, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, SELECT OPERATING CORPORATION and L. A. B. AMUSEMENT CORPORATION, Defendants.

AMENDED COMPLAINT

Plaintiff above named brings this civil action against the defendants above named, complaining and alleging as follows:

1. Plaintiff, Goldlawr, Incorporated, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, engaged in the business of operating a theatre known as the Erlanger Theatre at 21st and Market Streets, Philadelphia, Pennsylvania.

2. Defendants are Jacob J. Shubert and Lawrence Shubert Lawrence, Milton Shubert, William Klein and Sylvia W. Golde, individually and as Trustees of the Estate of [fol. 16] Lee Shubert, Deceased, and Marcus Heiman, who control, dominate and are the stockholders and principal officers and directors of their corporate instrumentalities, the defendant corporations, United Booking Office, Incorporated, Select Theatres Corporation, Select Operating Corporation and L. A. B. Amusement Corporation.

3. Defendants are engaged in the business of operating theatres and presenting legitimate attractions therein

throughout the United States, including the following theatres located in the City of Philadelphia: The Walnut Street Theatre, the Forrest Theatre, the Shubert Theatre and the Locust Theatre, and together with the aforesaid decedent, Lee Shubert, have been engaged in such operation continuously since prior to September 1, 1950.

4. Defendants, through their control and operation of the corporate defendant, United Booking Office, Incorporated, are engaged also in the business of booking legitimate attractions in theatres throughout the United States, including Philadelphia, and have been continuously since prior to September 1, 1950.

5. Defendants, through their interest in the Theatre Guild, Inc. and the American Theatre Society, as well as in the production of legitimate attractions by other producers, are engaged also in the production of legitimate attractions, and have been continuously since prior to September 1, 1950.

6. The theatre business consists of these three functions, production, booking and presentation of attractions in theatres. Because of their control and monopoly of the principal theatres in New York and elsewhere, including the theatres above referred to in the City of Philadelphia, and because of their domination, control and monopoly of booking of legitimate attractions both in New York and in Philadelphia and elsewhere throughout the United States, and because of their control over the production of legitimate attractions, the aforesaid defendants are able to and [fol. 17] do control and monopolize the operation of theatres in the City of Philadelphia, the booking of legitimate attractions therein and the presentation of such attractions in said theatres, and have exercised and enjoyed such domination, control and monopoly continuously since prior to September 1, 1950.

7. Plaintiff's Erlanger Theatre is a fine, modern, well-appointed and well-maintained theatre, equipped with a fine, large, well-designed stage, comfortable, modern seats, convenient of access with nearby parking facilities. It is superior to any of the theatres operated by defendants in

the City of Philadelphia and better suited to the presentation of legitimate attractions of all types than said theatres.

8. Since prior to September 1, 1950, plaintiff has made repeated demands upon defendants and their booking offices to be permitted to present legitimate attractions in the Erlanger Theatre, but despite such demands, said defendants have refused to book attractions in the said theatre with a few minor exceptions, generally when defendants' Philadelphia theatres were all otherwise occupied. The said defendants have likewise exerted pressure upon producers, by virtue of defendants' domination of production, booking and presentation of legitimate attractions, as set forth in this complaint, to prevent and restrain said producers from arranging and contracting with plaintiff to present attractions in plaintiff's Erlanger Theatre. The defendants are now engaged in the acts complained of in this paragraph and have been so engaged continuously since prior to September 1, 1950.

9. Defendants have further been enabled to conspire, as a result of their aforesaid domination, control and monopoly and the virtual exclusion of plaintiff from the presentation of attractions, and have conspired, with divers other persons, including ticket brokers, ticket scalpers and other such persons, to restrain the sale of tickets at the box [fol. 18] offices of their said theatres at the regular box office price in order to compel persons desiring to obtain such tickets to purchase the same from the said ticket brokers, ticket scalpers and other such persons at exorbitant prices far in excess of the regular box office price to the detriment of the public interest and of the patrons purchasing said tickets.

10. Defendants have also been enabled for the same reasons to charge, and have charged, box office prices higher than would otherwise have been charged patrons if they had not enjoyed the monopoly referred to herein, again to the detriment of the public and patrons.

11. Defendants, by their domination, monopoly and control, have stifled creative initiative and artistic develop-

ment among producers and in the theatre, and have denied to the public attractions which would have been available if the said defendants had not enjoyed and exercised the monopoly control herein complained of and excluded plaintiff and others from the presentation of attractions.

12. The business of producing, booking and presenting legitimate attractions is interstate commerce. Attractions generally are produced in New York, are then sent to Philadelphia, Boston, New Haven, Wilmington or elsewhere for trial showings, are then presented in New York for long periods and thereafter sent out for presentation throughout the United States.

13. The acts herein complained of are and have been continuously since prior to September 1, 1950 engaged in by the defendants pursuant to a conspiracy to restrain and monopolize interstate commerce, in violation of the antitrust laws of the United States, for the purpose of injuring and harming the public, particularly independent theatre operators, including plaintiff, and theatre patrons.

14. As a result of said conspiracy and the acts complained of, plaintiff has suffered irreparable injury and unless the conspiracy and acts complained of are enjoined, [fol. 19] it will continue to suffer irreparable injury and will be unable to obtain legitimate attractions for plaintiff's Erlanger Theatre.

15. This action is brought under Sections 4 and 6 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies and for Other Purposes", as amended and supplemented (15 USCA 15, 25), commonly known as the Clayton Act, and under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" (15 USCA 1 and 2), said Act being commonly known as the Sherman Antitrust Act.

16. As a result of defendants' conspiracy and the acts herein alleged, plaintiff has suffered damages since September 1, 1950 in the sum of $1,050,000.00.

WHEREFORE, plaintiff demands:

(a) That treble damages be awarded to plaintiff against defendants in the sum of $3,150,000.00, together with counsel fees and costs.

(b) That defendants and each of them be enjoined from conspiring or carrying out any acts or conduct pursuant to any conspiracy to interfere with plaintiff's right to present theatre attractions in a free and untrammeled market.

(c) That defendants be restrained from refusing to negotiate in good faith with plaintiff for the presentation of theatre attractions at plaintiff's Erlanger Theatre.

(d) That plaintiff have such other and further relief as shall be deemed just and proper.

/s/ HAROLD E. KOHN,
Harold E. Kohn,
Attorney for Plaintiff.

2635 Fidelity-Philadelphia
Trust Building,
Philadelphia 9, Pennsylvania.

[fol. 19a]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

..... DIVISION

Civil Action File No. 21506

GOLDLAWR, INCORPORATED, Plaintiff,

v.

JACOB J. SHUBERT and LAWRENCE SHUBERT LAWRENCE, MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, individually and as Trustees of the Estate of Lee Shubert, Deceased, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, SELECT OPERATING CORPORATION and L.A.B. AMUSEMENT CORPORATION, Defendant.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Dilworth, Paxson, Kalish & Green, Esqs., plaintiff's attorney, whose address is 2635 Fidelity Philadelphia Trust Bldg., Philadelphia, Pa., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Leo A. Lilly, Clerk of Court.

A. M. Heinemann, Deputy Clerk.

[Seal of Court]

Date: October 17, 1956

[Stamp—Dept. of Justice—Received Oct. 19, 1956—U. S. Marshal, Phil., Pa.]

[fol. 19b]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 7th day of November, 1956, I received this summons and served it together with the complaint herein as follows:

on November 7th, 1956, upon Marcus Heiman at 209 Quince St. Phila. Penna. by leaving copies thereof on desk of woman in charge of office who refused to give name or title and making contents of said service known to her. Service made in this manner by advice of plaintiff's attorney.

Marshal's Fees:

Travel	$.....
Service	$2.00
	$2.00

William A. O'Brien, U.S. Marshal, E.D. of Pa. By: George M. Gehringer, Deputy U.S. Marshal.

[fol. 19c]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

..... DIVISION

Civil Action File No. 21506

GOLDLAWR, INCORPORATED, Plaintiff,

v.

UNITED BOOKING OFFICE, INC., Defendant.

ALIAS SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Harold E. Kohn, Esq., plaintiff's attorney, whose address is 2635 Fidelity Philadelphia Trust Bldg., Philadelphia 9,

Pa., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Gilbert W. Ludwig, Clerk of Court.
A. M. Heinemann, Deputy Clerk.

[Seal of Court]

Date: March 12, 1957

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 19d] I hereby certify and return that on March 14 1957 I received the within summons and on March 19 1957 at 236 West 44 St NY NY I served same on the within-named defendant United Booking Office Inc (CAF 22092) by delivering to and leaving a copy thereof, together with a copy of the complaint with Marcus Heiman a Director.

Marshal's Fees

Travel	$1.00
Service	$2.00
	$3.00

Thomas J. Lunney, U.S. Marshal, SDNY, By: Raymond J. Enright, Deputy U.S. Marshal.

[fol. 20]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 22,092

GOLDLAWR, INCORPORATED, Plaintiff,

v.

JACOB J. SHUBERT and LAWRENCE SHUBERT LAWRENCE, MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, Individually and as Trustees of the Estate of Lee Shubert, Deceased, Individually and as Co-Partners, JOHN SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, SELECT OPERATING CORPORATION, MODERN THEATRE CORPORATION, BARRYMORE THEATRE CORPORATION and L. A. B. AMUSEMENT CORPORATION, Defendants.

COMPLAINT

Plaintiff above named brings this civil action against the defendants above named, complaining and alleging as follows:

1. Plaintiff, Goldlawr, Incorporated, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, engaged in the business of operating a theatre known as the Erlanger Theatre at 21st and Market Streets, Philadelphia, Pennsylvania.

2. Defendants are Jacob J. Shubert and Lawrence Shubert Lawrence, Milton Shubert, William Klein and Sylvia W. Golde, individually and as Trustees of the Estate of Lee [fol. 21] Shubert, Deceased, individually and as co-partners, John Shubert and Marcus Heiman, who control, dominate and are the stockholders and principal officers and directors of their corporate instrumentalities, the defendant corporations, United Booking Office, Incorporated, Select Theatres Corporation, Select Operating Corporation, Modern

Theatre Corporation, Barrymore Theatre Corporation and L. A. B. Amusement Corporation.

3. Defendants are engaged in the business of operating theatres and presenting legitimate attractions therein throughout the United States, including the following theatres located in the City of Philadelphia: The Walnut Street Theatre, the Forrest Theatre, the Shubert Theatre and the Locust Theatre, and together with the aforesaid decedent, Lee Shubert, have been engaged in such operation continuously since prior to September 1, 1950.

4. Defendants, through their control and operation of the corporate defendant, United Booking Office, Incorporated, are engaged also in the business of booking legitimate attractions in theatres throughout the United States, including Philadelphia, and have been continuously since prior to September 1, 1950.

5. Defendants, through their interest in the Theatre Guild, Inc. and the American Theatre Society, as well as in the production of legitimate attractions by other producers, are engaged also in the production of legitimate attractions, and have been continuously since prior to September 1, 1950.

6. The theatre business consists of these three functions, production, booking and presentation of attractions in theatres. Because of their control and monopoly of the principal theatres in New York and elsewhere, including the theatres above referred to in the City of Philadelphia, and because of their domination, control and monopoly of booking of legitimate attractions both in New York and in [fol. 22] Philadelphia and elsewhere throughout the United States, and because of their control over the production of legitimate attractions, the aforesaid defendants are able to and do control and monopolize the operation of theatres in the City of Philadelphia, the booking of legitimate attractions therein and the presentation of such attractions in said theatres, and have exercised and enjoyed such domination, control and monopoly continuously since prior to September 1, 1950.

7. Plaintiff's Erlanger Theatre is a fine, modern, well-appointed and well-maintained theatre, equipped with a fine, large, well-designed stage, comfortable, modern seats, convenient of access with nearby parking facilities. It is superior to any of the theatres operated by defendants in the City of Philadelphia and better suited to the presentation of legitimate attractions of all types than said theatres.

8. Since prior to September 1, 1950, plaintiff has made repeated demands upon defendants and their booking offices to be permitted to present legitimate attractions in the Erlanger Theatre, but despite such demands, said defendants have refused to book attractions in the said theatre with a few minor exceptions, generally when defendants' Philadelphia theatres were all otherwise occupied. The said defendants have likewise exerted pressure upon producers, by virtue of defendants' domination of production, booking and presentation of legitimate attractions, as set forth in this complaint, to prevent and restrain said producers from arranging and contracting with plaintiff to present attractions in plaintiff's Erlanger Theatre. The defendants are now engaged in the acts complained of in this paragraph and have been so engaged continuously since prior to September 1, 1950.

9. Defendants have further been enabled to conspire, as a result of their aforesaid domination, control and monopoly and the virtual exclusion of plaintiff from the presentation of attractions, and have conspired, with divers other [fol. 23] persons, including ticket brokers, ticket scalpers and other such persons, to restrain the sale of tickets at the box offices of their said theatres at the regular box office price in order to compel persons desiring to obtain such tickets to purchase the same from the said ticket brokers, ticket scalpers and other such persons at exorbitant prices far in excess of the regular box office price to the detriment of the public interest and of the patrons purchasing said tickets.

10. Defendants have also been enabled for the same reasons to charge, and have charged, box office prices higher than would otherwise have been charged patrons if

they had not enjoyed the monopoly referred to herein, again to the detriment of the public and patrons.

11. Defendants, by their domination, monopoly and control, have stifled creative initiative and artistic development among producers and in the theatre, and have denied to the public attractions which would have been available if the said defendants had not enjoyed and exercised the monopoly control herein complained of and excluded plaintiff and others from the presentation of attractions.

12. The business of producing, booking and presenting legitimate attractions is interstate commerce. Attractions generally are produced in New York, are then sent to Philadelphia, Boston, New Haven, Wilmington or elsewhere for trial showings, are then presented in New York for long periods and thereafter sent out for presentation throughout the United States.

13. The acts herein complained of are and have been continuously since prior to September 1, 1950 engaged in by the defendants pursuant to a conspiracy to restrain and monopolize interstate commerce, in violation of the antitrust laws of the United States, for the purpose of injuring and harming the public, particularly independent theatre operators, including plaintiff, and theatre patrons.

14. As a result of said conspiracy and the acts complained of, plaintiff has suffered irreparable injury and [fol. 24] unless the conspiracy and acts complained of are enjoined, it will continue to suffer irreparable injury and will be unable to obtain legitimate attractions for plaintiff's Erlanger Theatre.

15. This action is brought under Sections 4 and 6 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies and for Other Purposes", as amended and supplemented (15 USCA 15, 25), commonly known as the Clayton Act, and under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monop-

olies" (15 USCA 1 and 2), said Act being commonly known as the Sherman Antitrust Act.

16. As a result of defendants' conspiracy and the acts herein alleged, plaintiff has suffered damages since September 1, 1950 in the sum of $1,050,000.00.

WHEREFORE, plaintiff demands:

(a) That treble damages be awarded to plaintiff against defendants in the sum of $3,150,000.00, together with counsel fees and costs.

(b) That defendants and each of them be enjoined from conspiring or carrying out any acts or conduct pursuant to any conspiracy to interfere with plaintiff's right to present theatre attractions in a free and untrammeled market.

(c) That defendants be restrained from refusing to negotiate in good faith with plaintiff for the presentation of theatre attractions at plaintiff's Erlanger Theatre.

(d) That plaintiff have such other and further relief as shall be deemed just and proper.

/s/ HAROLD E. KOHN,
Harold E. Kohn,
Attorney for Plaintiff.

2635 Fidelity-Philadelphia
Trust Building,
Philadelphia 9, Pennsylvania.

[fol. 25] IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

OPINION—December 22, 1958

(Filed jointly in E. D. Pa. Actions #21506 and #22092)

KRAFT, *J.*

Plaintiff commenced these two actions against substantially the same defendants under relevant provisions of the antitrust laws. The first action (21506) was commenced

on October 17, 1956 and the second (22092) on February 18, 1957. The actions are essentially identical except that the second (a) added certain defendants, (b) sued several original defendants in additional capacities and (c) extended the period for which damages are sought. Now pending are numerous pre-trial motions which will be disposed of seriatim.

I. Motions to Dismiss for Improper Venue.

These motions were filed by all defendants in both actions except Barrymore Theatre Corporation (Barrymore) and Modern Theatre Corporation (Modern).[1] Disposition of these motions requires some analysis of the facts germane to two classes of defendants, i.e., individuals and corporations.

(a) Individual Defendants.

After granting a cause of action under the antitrust laws to anyone injured in his business or property, 15 U. S. C. A. § 15 lays the venue in such actions in " . . . any district court of the United States in the district in which the defendant resides or is found or has an agent, . . ." We reject defendants' contention that 28 U. S. C. A. § 1391(b), a general venue statute, applies. By its express [fol. 26] terms § 1391(b) does not apply where a different law provides otherwise.[2]

Lawrence Shubert Lawrence (Lawrence) resided in this district and was properly sued here.

Plaintiff does not contest the averments in the remaining individual defendants' affidavits that each resided in New York and, since none of them was *found* here, we must determine whether any of them had *an agent* here.

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[1] Modern and Barrymore are not defendants in 21506. Both filed answers in 22092.

[2] See Fourco Glass Co. v. Transmirra Products Corp., 353 U. S. 222, 228 (1957); Anderson-Friberg, Inc. v. Justin R. Clary & Son, Inc., 98 F. Supp. 75, 83 (S. D. N. Y. 1951); Lipp v. National Screen Service Corp., 95 F. Supp. 66, 70 (E. D. Pa. 1950).

Prior to 1914, venue in antitrust actions was laid in the district in which the defendant resided or was found.[3] The addition of the district in which defendant "has an agent" was a change made by the Clayton Act, which also enlarged prior venue provisions as to corporations by adding thereto the district in which a corporation transacts business.[4] In *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927), the court construed the latter addition as one intended to broaden the concept of "found" in the earlier venue provisions. A corporation could thus be held to be transacting business, and venue established, "—although not present by its agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character."[5] To meet the test of "found" in the earlier venue provisions, *People's Tobacco Co., Ltd.* v. *American Tobacco Co.*, 246 U. S. 79, 84, 86 (1918) required the presence of agents carrying on business as described above.

We believe "or has an agent" broadened the concept of "found" in the case of individual defendants, just as "transacts business" broadened the concept of "found" in the case of corporate defendants, although *Eastman* did not [fol. 27] decide this question. The purpose of these two changes was to ". . . give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries."[6] The difference in the choice of words applicable to individual and corporate defendants was intended to avoid too broad a change which might have jeopardized passage of the entire bill.[7]

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[3] Act of July 2, 1890, c. 647.

[4] 15 U. S. C. A. § 22.

[5] 273 U. S. at p. 373. See also, United States v. Scophony Corporation of America, 333 U. S. 795, 807 (1948) which reaffirmed this construction.

[6] United States v. National City Lines, Inc., 334 U. S. 573, 583 (1948).

[7] Id. at p. 585.

> "Thus, *strict* uniformity in the two sections' venue provisions was not achieved. But whatever their differences may be, *each addition was designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient*, enforcement of antitrust prohibitions."[8] (Emphasis supplied.)

From the affidavits filed by the parties it appears that both J. J. Shubert and John Shubert had the unquestioned right and power to control Lawrence and that each repeatedly exercised such right and power in directing Lawrence's business activities in this district. The extent of J. J. Shubert's exercise of control over Lawrence is somewhat surprising, in view of the latter's high position in the Shubert enterprises. J. J. Shubert ratified the orders of Lawrence for repairs to local theatres, authorized his vacations, negotiated contracts with local unions, arranged schedules for the lengths of runs in local theatres, and, in some instances, even personally inspected local theatres.[9] John Shubert, a defendant in 23092, exercised a like degree of control over Lawrence in the operation of local theatres. He instructed Lawrence on the changes to be made in contracts, on the changes of performances from one Philadelphia theatre to another, on the orders for tickets for [fol. 28] performances, on increases and decreases in ticket prices, on price scales, advertising, and on other matters. It is difficult to conceive of a more scrupulous control than that exercised both by J. J. and by John Shubert over Lawrence in the business conduct of the local theatres. We find, therefore, that, as the term is defined at common law and under the more liberal intendment of antitrust cases, Lawrence was the agent of both Shuberts within

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[8] Id. at p. 586.

[9] See exhibits 155 to 180 accompanying plaintiff's affidavit.

the meaning of 15 U. S. C. A. § 15.[10] See *Riss & Company, Inc.* v. *The Association of Western Railways*, 159 F. Supp. 288, 293 (D. C. D. C. 1958).

The evidence does not persuade us, however, that any other of the moving individual defendants had an agent within this district.

Accordingly, the motions of Lawrence and J. J. Shubert in 21506 and 22092 and of John Shubert in 22092 will be denied. The motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, individually, in each action, will be granted.

(b) Corporate Defendants.

United Booking Office, Inc. (U. B. O.), Select Theatres Corporation (Select Theatre), Select Operating Corporation (Select Operating), and L. A. B. Amusement Corporation (L. A. B.) are defendants in both actions. Barrymore Theatre Corporation (Barrymore) and Modern Theatre Corporation (Modern) are defendants only in 22092. There are no motions before us by Barrymore or Modern or by L. A. B. which appears to have been dissolved on June 19, 1952. We have for consideration the motions of U. B. O., Select Theatre and Select Operating.

From the affidavits and accompanying exhibits filed by the parties it is evident that the material facts affecting the [fol. 29] internal organization, the inter-corporate functions and dealings of the corporations are not matters of substantial dispute. It is upon the legal significance of those facts that disagreement exists. The complicated nature of the arrangements among these corporations necessitates a somewhat detailed discussion of the relevant facts.

Select Theatre was the parent corporation. All of its preferred and 90% of its common stock was owned by various members of the Shubert family. Select Theatre

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[10] It may be noted, parenthetically, that the fact that J. J. and John Shubert may have been acting in their respective capacities as corporate officers does not mean that, for venue purposes, they had no agents here as individuals. See, United States ex rel. Marcus v. Hess, 41 F. Supp. 197, 211 (W. D. Pa. 1941). See also, 15 U. S. C. A. § 24.

was the owner of all of the stock of Select Operating, Barrymore and Modern and was the owner of 50% of the stock of U. B. O., the other 50% of which was owned by Marcus Heiman, President of U. B. O.

The two wholly-owned local subsidiaries, Barrymore and Modern, ostensibly operated the Philadelphia theatres and were the only corporate defendants licensed to do business in Pennsylvania. Purportedly, Barrymore operated the Forrest Theatre and Modern the Walnut, Locust and Shubert Theatres. All the corporate defendants, except Modern, a Pennsylvania corporation, were incorporated in New York and had their offices there in the same building. U. B. O., Select Theatre and Select Operating were not licensed to do business in Pennsylvania and had no address, telephone listing or officers resident in that state.

Corporate separateness in accounting procedures was observed in the actual day to day operation of these enterprises. The treasurer of each Philadelphia theatre collected the receipts, deducted the local amusement tax and remitted the amount of the tax to Select Operating, which kept the books of all the corporations. Select Operating deposited the tax remittance in a special account in New York to the sender's credit and issued its own check to the taxing authority for the respective account of Barrymore or Modern. The tax returns for the local corporations were prepared by Select Operating and forwarded with the remittances.

[fol. 30] Each week the manager of each local theatre deposited the balance of the weekly receipts in a Philadelphia bank and issued a check to Select Operating for that amount. Customary payroll deductions, etc., were computed in Philadelphia and a check for such deductions was likewise issued to Select Operating. These were accumulated in New York and appropriate returns were prepared and payments made by Select Operating for Modern and Barrymore.

Defendant Lawrence was the general manager of the Philadelphia theatres and was ostensibly employed by Barrymore and Modern. Each of these corporations sent its proportionate share of Lawrence's salary to Select Operating in New York and the latter issued its own check

in payment of his salary. Both Barrymore and Modern contributed to the operational cost of Select Operating and also paid it a "home office fee" for "executive and management services".

Shows were booked in New York through the services of Select Operating or U. B. O. This entailed agreements for the use by producers of designated theatres on specific dates. The terms of each booking agreement were embodied in a written contract signed by the producer and either Barrymore or Modern as the case might be. Either J. J. Shubert or John Shubert executed the contract as an officer of Barrymore or Modern.

Select Operating also executed blanket contracts for concessions in all four Philadelphia theatres and the amounts received therefrom were apportioned on its books between the corporate operators of the local theatres.

The foregoing facts which appear in defendants' affidavits indicate clearly that in accounting procedures, at least, corporate separateness was carefully observed. In the exhibits accompanying plaintiff's affidavit, however, are strong indications that, in other respects, corporate separateness was not so meticulously adhered to.

Excerpts from the minute books of Select Theatre show that the corporate existence of Barrymore and Modern was [fol. 31] largely discretionary with the parent. Correspondence between Select Theatre and Philadelphia, signed by J. J. Shubert and others on Select Theatre stationery, evidences a close control by Select Theatre of the minutiae of day to day operating procedures. The insurer of the local theatres addressed all correspondence to Select Theatre. Documents relating to the opening of a local bank account by a subsidiary were sent to Philadelphia by Select Theatre. Office materials such as stationery, ticket envelopes, etc., for Barrymore and Modern were supplied by Select Theatre. The advertising of the four local theatres was consolidated. Each theatre used its facilities to advertise plays presented at the others.

Select Theatre sent to Philadelphia "termination of contract notices" to be signed by local employees. J. J. Shubert for Select Theatre was kept carefully advised of the status of contracts with musicians in Philadelphia and

other cities. Select Theatre instructed local managers about obtaining discounts for advertising in Philadelphia papers, about excessive expenditures for telephone calls and requested weekly reports on the operation of the local theatres.

Although bookkeeping seems to have been the major function of Select Operating, it was also the center from which supplies were sent to the Philadelphia theatres. Employment records and copies of contracts for shows were also kept by Select Operating.

U. B. O. booked shows for the Philadelphia theatres and determined the booking dates. It negotiated the terms of the contracts with the producers. Inquiries by private parties about the use of the Philadelphia theatres were referred to U. B. O.

In the case of corporations the test for venue under the antitrust law is, as we have said, whether the corporation is an inhabitant of, is found in or transacts business in the district in which suit is brought.

None of the three moving corporate defendants was an inhabitant of this district. The tests which determine [fol. 32] whether a corporation is "found" within the district are narrower in scope than those which determine whether it "transacts business" therein. We shall, therefore, determine whether any of the moving corporate defendants transacted business in this district.[11]

We decline to adopt the plaintiff's theory that the allegation of conspiracy in the complaint constitutes Barrymore or Modern or both, as alleged co-conspirators, the agent or agents of the movant corporate defendants for venue purposes under the Clayton Act in any district where Barrymore or Modern is amenable to suit. Several cases have so held,[12] in purported reliance on *Giusti* v. *Pyrotechnic*

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[11] Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U. S. 359 (1927).

[12] Rios & Company, Inc. v. The Association of Western Railways, 159 F. Supp. 288, 295, 296 (D. C. D. C. 1958); De Golia v. Twentieth Century-Fox Film Corp., 140 F. Supp. 316 (N. D. Cal. 1953); Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc., 140 F. Supp. 401 (E. D. Va. 1954); Don George, Inc. v. Paramount Pictures, Inc., 111 F. Supp. 458 (W. D. La. 1951).

Industries, Inc., 156 F. 2d 351 (9th Cir. 1946), but we incline to the reasoning in two recent cases which conclude that it is doubtful that *Giusti* so held or that this is the law in any circuit.[13]

It is next urged that venue can be laid in this district on the ground that Select Theatre, Select Operating and U. B. O. were themselves transacting business here or were doing so through the agency of Barrymore and/or Modern, the wholly-owned subsidiaries of Select Theatre. The evidence fails to persuade us that these corporations were themselves doing business here. We consider, then, whether the transaction of business here by Barrymore and Modern is sufficient, under the circumstances, to warrant holding that their parent, Select Theatre, did so.

We are mindful that the Supreme Court has held that, as long as corporate separateness is strictly maintained, service of process on a wholly-owned subsidiary does not [fol. 33] subject the parent corporation to the court's jurisdiction, even though the purpose of incorporating the subsidiary was to avoid subjection of the parent to such jurisdiction. *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925). We are also aware that in several antitrust cases the standard of *Cannon* has been adopted in determining questions of venue. However, *Cannon* itself deemed the rule inapplicable where an *affirmative ground is shown for treating the subsidiary as an agent of the parent*, and antitrust cases have recognized the limitation.[14]

In the present case an affirmative ground has been shown, we think, for treating Barrymore and Modern as local agents of their parent, Select Theatre, for the same reasons which impel us to hold Lawrence, individually, to be an agent of J. J. and John Shubert. The Shuberts, in their right and power to control Lawrence, as well as in their

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[13] Bertha Building Corp. v. National Theatres Corp., 248 F. 2d 833, 836 (2d Cir. 1957); Independent Productions Corp. v. Loew's, Inc., 148 F. Supp. 460 (S. D. N. Y. 1957). See also, Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784 (S. D. N. Y. 1936).

[14] United States v. The Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40, 45 (S. D. N. Y. 1955).

exercise of that right and power, were acting both as corporate officers and as individuals and, on many occasions, in such fashion as to make inseparable the capacity in which, respectively, they acted. Thus, as officers of the parent corporation, they had the right and power to and did control the acts of Lawrence, as an executive employee of the two local subsidiaries.

In *Waldron* v. *British Petroleum Co., Ltd.*, 149 F. Supp. 830 (S. D. N. Y. 1957), a case remarkably similar to this, the court held a foreign parent to be transacting business in the forum by reason of the activities of its wholly-owned subsidiaries there. In that case a foreign corporation maintained two wholly-owned subsidiaries in the Southern District of New York, at least one of which attempted to preserve technical separateness from its parent. The court, noting the active interrelation between parent and subsidiary in other respects, held as we have indicated. Certain language in the court's opinion in that case appears particularly apropos here and we quote it *in extenso*:

> [fol. 34] "A person would have to be blind to the economic facts of business life if he did not recognize that the activities of [the subsidiaries] in this District are activities which in another less elaborate corporate set-up would be conducted directly by branch offices or agents within the District. It is Socal, and not the subsidiaries, which is the defendant in the present action. What is Socal? It is a large aggregation of invested capital which transacts its business through officers, agents, employees, and through subsidiaries, which in the drilling, production and marketing of oil operate as agents, employees or branch offices would operate. *Does the fact that this large business entity, for tax reasons or otherwise, decides to fragmentize its operations into numerous corporate subsidiaries, make the resulting operations of the subsidiaries any the less a part of transaction of business by Socal?*" (p. 834) (Emphasis supplied).
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> "A corporation may be a fiction of the law but there is no reason to carry the fiction to the extreme of

saying that a corporation which has wholly owned subsidiaries performing services in the local jurisdiction which ordinarily would be performed by service employees, or making sales which ordinarily would be made by a sales department, is in fact not transacting business in that jurisdiction, *particularly when the entire corporate set-up of the defendant shows that it is designed to operate to a substantial degree through separate corporate entities responding to the wishes and directions of the parent and providing the revenues sought by the parent. We would be exalting fiction over fact if we were to conclude that under those circumstances the parent company was not in fact transacting business in this District through the instrumentality of its wholly owned subsidiaries.*" (p. 835) (Emphasis supplied).

[fol. 35] The applicability of this language to the facts before us is clear. Lawrence, through Barrymore and Modern, conducted the actual operations, but only subject to the controlling directions of Select Theatre, acting through the Shuberts. Cf. *United States* v. *The Watchmakers of Switzerland Information Center, Inc.*, 134 F. Supp. 710, 712 (S.D. N. Y. 1955).

We consider, next, whether the transaction of business here by Barrymore and Modern is sufficient, under the circumstances, to warrant holding that Select Operating or U. B. O. did so.

Select Operating owned no stock of Barrymore or Modern. All of Select Operating's stock was owned by Select Theatre. Select Operating cannot be held to have transacted business here by reason of the activities of its wholly-owned subsidiaries because Barrymore and Modern were wholly-owned subsidiaries of Select Theatre, not of Select Operating.

The evidence persuades us that the principal function of Select Operating was to provide a central bookkeeping system and service department for the enterprises which Select Theatre owned or controlled, among them Barrymore and Modern. Select Theatre was the principal and Select Operating its agent. Neither Barrymore nor Modern was

agent for Select Operating; to the contrary, Select Operating was, for certain purposes, their agent under the control and direction of their common principal, Select Theatre. The business transacted here by Barrymore and Modern was under the control and direction and for the benefit of Select Theatre, not Select Operating.

U. B. O. owned no stock of Barrymore or Modern. Half of U. B. O.'s stock was owned by Select Theatre and half by Marcus Heiman. U. B. O. cannot be held to have transacted business here by reason of the activities of its wholly-owned subsidiaries because Barrymore and Modern were wholly-owned subsidiaries of Select Theatre, not of U. B. O.

[fol. 36] The evidence persuades us that the principal function of U. B. O. was to serve as an intermediary and clearing house between theatrical producers and theatre owners including, but not limited to, Select Theatre and its subsidiaries. Select Theatre was one of the principals for which U. B. O. functioned as broker or agent. Neither Barrymore nor Modern was agent for U. B. O.; to the contrary, U. B. O. was, for booking purposes, their broker or agent under the control and direction of Select Theatre. The business which Barrymore and Modern transacted here was under the control and direction and for the benefit of Select Theatre, not U. B. O. The latter's apparent power to fix price scales for Barrymore and Modern was a power in fact exercised by Select Theatre through John Shubert, though on U. B. O. stationery, and was not a power possessed by U. B. O.

Defendants place great reliance upon *Pfeifer* v. *United Booking Office, Inc.*, 92 F. Supp. 363 (N. D. Ill. 1950) in which the court granted a motion to dismiss made by the same three defendants upon the same grounds which they here advance. However, we think that *Pfeifer* is, in part, distinguishable from the present case principally because the interrelations between parent and subsidiaries are more fully revealed here than there.

As to Select Theatre, which owned all the stock of the local Chicago corporation, that court found that the separation between parent and subsidiary was "real". The conclusion was that correspondence between named employees of Select Theatre and the Chicago manager did not show

that Select Theatre had any authority over the local manager. As indicated by what we have said heretofore, such a conclusion could not be fairly drawn here from the correspondence between J. J. Shubert and Lawrence.

It is of interest to note that in *Waldron*, supra, there was a like claim by the parent that *two* prior cases against the same defendants had been decided favorably to the parent corporation upon its motions to dismiss for lack of venue. The court, in *Waldron*, pointed out that the *Sco-*[fol. 37] *phony* ruling was made after the decisions in those cases and stated: "It is doubtful if a court today, guided as it must be by these later opinions of the United States Supreme Court, could reach the same conclusion as Judge Bright did in the Universal Oil Products case" (pp. 835, 836). The latter case, referred to by the court in *Waldron*, was *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 70 F. Supp. 77 (S. D. N. Y. 1946), which was the only case relied on by *Pfeiffer*.

The motion of Select Theatre will, therefore, be denied and the motions of Select Operating and U. B. O. will be granted.

II. Motions to Quash Service and Dismiss the Action for Lack of Jurisdiction Over the Person.

A. Fiduciary Defendants.

These motions have been filed, inter alia, on behalf of the fiduciary defendants in both actions, i.e., Lawrence, Milton Shubert, William Klein and Sylvia W. Golde as *trustees* of the estate of Lee Shubert, deceased. The basis of the motions is that the fiduciaries act under the authority of the state of New York, are not amenable to and have not consented to suit in this district.

The unimpeached affidavits of these fiduciary defendants establish that they have not been designated or qualified as fiduciaries in any state other than New York; that they have not consented to suit in any other state; that they have not received or administered any assets of the estate;

that the trusts of which they are trustees have not been established; that they have not, as trustees, engaged in or transacted any business in Pennsylvania; that no assets of the estate are within this district; that there is no office of the estate within this district.

Lacking any affirmative statement or brief on this subject from the plaintiff, our independent investigation fails [fol. 38] to reveal any ground upon which jurisdiction over these fiduciaries can be sustained. Under F. R. Civ. P. 17(b) the capacity of an individual acting in a representative capacity to be sued is determined by the law of the state in which the district court is held. If these fiduciaries lack capacity to be sued in Pennsylvania this court is without jurisdiction.

The general rule at common law is that a foreign personal representative may not be sued on a claim against the decedent's estate in a jurisdiction other than that of his appointment. Although Pennsylvania would appear at first glance to differ, we believe that close analysis of the cases supports the conclusion that, despite an apparent difference, a foreign representative may be sued in Pennsylvania only if there are assets of the estate present there.

In the leading case of *Laughlin & McManus* v. *Solomon*, 180 Pa. 177 (1897) a Delaware executor was served in Pennsylvania in an action upon a note. The trial court sustained the defendant's demurrer to the complaint and the Supreme Court reversed. Plaintiff-appellant contended that it could not be assumed in the pleading stage that the executor had no assets of the estate within the state and that evidence might establish the presence of assets within the state when the decedent died or the presence of assets thereafter brought into the state by the executor, in either of which instances the action was maintainable. In apparent acceptance of plaintiff's argument the court distinguished *Magraw* v. *Irwin*, 87 Pa. 139 (1878) and declared that case to be in harmony with Pennsylvania law. In *Magraw* the only assets of the estate ever within Pennsylvania were withdrawn by the executrix after they had been awarded to her as legatee. After her death a foreign administrator c.t.a. was appointed and, having entered the state, was sued. The

court held that the succeeding administrator could not be charged in Pennsylvania with assets which had been administered and distributed and that no jurisdiction over the fiduciary was acquired. Of *Magraw* the Laughlin case said (p. 183):

> [fol. 39] "The decision therefore goes no further than the principle . . ., that an administrator is not chargeable with assets in another state which have never been within his control. . . ."

In the present case the only available evidence is that the fiduciaries have no assets here and are not present in a fiduciary capacity. See, *Independent Productions Corp.* v. *Loew's, Inc.*, 148 F. Supp. 460, 462 (S. D. N. Y. 1957).

In *Laughlin* there was no evidence of the presence or absence of assets. In *Magraw*, it was established upon trial that there were no assets within the jurisdiction. We conclude then that, under Pennsylvania law, where it affirmatively appears that no assets of a foreign estate are present in the forum no jurisdiction is acquired over the foreign representatives of the estate. This Circuit has interpreted the *Laughlin* case as authorizing local suits against foreign representatives only " . . . where claims to property within the jurisdiction of the court are involved." *Callwood* v. *The Virgin Islands National Bank*, 221 F. 2d 770, 778 (3rd Cir. 1955).

The motions of the fiduciary defendants will accordingly be granted.

B. Individual and Corporate Defendants.

We consider next the motions of J. J. Shubert, John Shubert and Select Theatre as to whom we have concluded venue was proper.

15 U. S. C. A. § 22, after laying the venue against corporations in antitrust actions provides that ". . . all process in such cases may be served in the district of which it [the corporation] is an inhabitant or wherever it may be found." Once venue is properly established it appears that a defendant corporation may be served at either place desig-

nated by the statute, even though those places are outside the district in which suit has been brought."[15]

[fol. 40] Extra-territorial service upon Select Theatre in each action was by alias summons in New York where that defendant admittedly had its principal office. This service was proper.[16]

By the provisions of F. R. Civ. P. 4(d)(7) service upon J. J. Shubert and John Shubert was authorized ". . . in the manner prescribed . . . by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." In Pennsylvania, Pa. R. Civ. P. 1009(b)(2)(iii) authorizes service upon individuals by handing a copy of the summons or complaint "at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof."

In 21506 J. J. Shubert was purportedly served by leaving a copy of the summons and complaint at 209 Quince Street, Philadelphia "on the desk of woman in charge who refused to give her name or title." In 22092 service was purportedly effected on J. J. Shubert and John Shubert by leaving copies of the summons and complaint at the same address with "Mrs. C. E. Richman woman in charge of Forrest Theatre place of business designated by plaintiff's attorney for service on defendant."

From the affidavits filed by counsel it appears unchallenged that 209 Quince Street is the local office or usual place of business of Barrymore and Modern and that both

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[15] Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U. S. 359, 373 (1927); Pfeiffer v. United Booking Office, 93 F. Supp. 363, 364-65 (N. D. Ill. 1950); Sure-Fit Products Co. v. Fry Products, Inc., 23 F. Supp. 610, 612 (S. D. N. Y. 1938); Katz Drug Co. v. W. A. Sheaffer Pen Co., 6 F. Supp. 210, 212 (W. D. Mo. 1932).

[16] Waldron v. British Petroleum Co., Ltd., 149 F. Supp. 830, 836 (S. D. N. Y. 1957) upheld a similar service in a similar situation. In each action an alias summons was served on Select Theatre by leaving a copy of the complaint and summons with J. J. Shubert, its president, at the corporate office, 236 W. 44th St., New York City.

J. J. Shubert and John Shubert are officers of these corporations.

The rule in this district following the Pennsylvania law, is that the Marshal's return is conclusive and cannot be attacked as false in fact,[17] so that we accept as a fact that [fol. 41] the person to whom the copies of the summons and complaint were handed was for the time being in charge of the office at 209 Quince Street.

In *Wylie* v. *McKnight*, 10 Beaver C. L. J. 145, 153 (Pa. Comm. Pl. 1948) service upon individual defendants by leaving copies of the complaint at the office of a corporation of which they were officers and directors was sustained despite the fact that the defendants lived and transacted their business in a different county.[18] Upon the authority of *Wylie*, and in view of the fact that the purpose of service is to insure that a defendant will receive actual knowledge of the commencement of the action against him, we conclude that the manner of service upon the two individual defendants was proper.

The motions of Select Theatre and J. J. Shubert in each action will be denied and the motion of John Shubert in 22092 will be denied.

III. Motions for Summary Judgment.

Civil Action 22092 was commenced on February 18, 1957. In that action the defendants Barrymore, Modern and Lawrence have moved for summary judgment under F. R. Civ. P. 56 on the ground that any cause of action arising prior to February 18, 1953 is barred by the applicable statute of limitations; 15 U. S. C. A. § 15(b) (Supp. 1957). Plaintiff contends, however, that the statute of limitations was tolled as to the moving parties by reason of 15 U. S. C. A. § 16(b) (Supp. 1957) because an antitrust

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[17] Woods v. Zellers, 9 F. R. D. 6 (E. D. Pa. 1949). *Accord:* Hicklin v. Edwards, 226 F. 2d 410 (8th Cir. 1955). *Contra:* Metropolitan Theatre Co. v. Warner Bros. Pictures, 16 F. R. D. 391 (S. D. N. Y. 1954); Puett Electrical Starting Gate Corp. v. Thistle Down Co., 2 F. R. D. 550 (N. D. Ohio 1942).

[18] See also, Messing v. Messing, 84 D. & C. 367, 375 (Pa. Comm. Pl. 1952).

action, which terminated in a consent judgment, was commenced against the Shubert interests on February 21, 1950.

The motions of Barrymore, Modern and Lawrence in 22092 will be denied without prejudice to their rights to assert the statute of limitations as a defense, in whole or in part, in their responsive pleadings.

[fol. 42]

IV. Plaintiff's Motion for Leave to File an Amended Complaint.

Plaintiff has filed this motion in 21506 for the sole purpose of extending to September 1, 1950 the period during which the acts in the original complaint are alleged to have occurred. In other respects the amended complaint is essentially identical with the original and, in its proposed form, is substantially identical with the complaint in 22092.

The defendants in 21506, other than Lawrence, have not filed or served responsive pleadings and, as to them, the plaintiff may amend its complaint as of course. That a responsive pleading was served by one defendant, Lawrence does not alter this result.[19]

Leave to amend the complaint against Lawrence will be granted without prejudice to his right to assert in his responsive pleading the defenses raised in his motion for summary judgment.

V. Motions to Vacate Ex Parte Order Permitting Joinder of Third Party Defendants and to Dismiss the Third Party Complaint.

The essence of the third party complaint in each action is that William Goldman and William Goldman Theatres, Inc., predecessors to plaintiff as lessee of the Erlanger Theatre, conspired with each other to abandon efforts to secure first-run motion pictures for the Erlanger, a func-

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[19] F. R. Civ. P. 15(a); see Ginsburg v. Stern, 19 F. R. D. 238, 241 (W. D. Pa. 1956) *order aff'd in part*, 242 F. 2d 379 (3rd Cir. 1957); cert. denied, 26 L. W. 3298; Peckham v. Scanlon, 241 F. 2d 761, 764 (7th Cir. 1957); Simmons v. Cantor, 3 F. R. D. 197 (W. D. Pa. 1943); Pallant v. Sinatra, 8 Fed. Rules Serv. 15a.11, Case 1 (S. D. N. Y. 1945).

tion to which that theatre is allegedly better suited. It is alleged that the object of this conspiracy was to afford other theatres operated by William Goldman Theatres, Inc. a competitive advantage over the Erlanger to eliminate it from competition with the other theatres in violation of the antitrust laws. It is further alleged that William Goldman [fol. 43] is president and controls the third party corporate defendant.

This complaint states no claim upon which relief can be granted. It has been decided that a corporation may not conspire with itself, i.e., with its officers, agents and employees. *Nelson Radio and Supply Co., Inc.*, v. *Motorola, Inc.*, 200 F. 2d 911, 914 (5th Cir. 1952).[*]

These motions will be granted.

VI. Motions to Strike Paragraphs 9 and 10 From the Complaints.

Each of the remaining defendants has moved in each action to strike from the complaint paragraphs 9 and 10 upon the grounds that they are irrelevant to any injury allegedly incurred by the plaintiff and are scandalous.

In each complaint these paragraphs allege, in substance, that as a result of defendants' exclusion of the plaintiff from the presentation of theatrical productions, the defendants have conspired with divers persons to restrain the sale of tickets at regular prices at the ticket offices of their respective theatres in order to oblige prospective patrons to buy tickets from brokers and "ticket scalpers" at prices which exceed the established theatre prices; further, that the defendants have thus been enabled to charge and have charged higher prices for tickets than they would otherwise

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[*] See also, Packaged Programs, Inc. v. Westinghouse Broadcasting Company, Inc., 156 F. Supp. 76, 78 (W. D. Pa. 1957); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 153 F. Supp. 684, 686 (N. D. Ill. 1957); Herren Candy Co. v. The Curtis Candy Co., 153 F. Supp. 751, 755 (N. D. Ga. 1957); Beacon Fruit & Produce Co., Inc. v. H. Harris & Co., Inc., 152 F. Supp. 702, 704 (D. Mass. 1957); Sperry Rand Corp. v. Nassau Research and Development Associates, Inc., 152 F. Supp. 91, 93 (E. D. N. Y. 1957); J. H. Whiteley v. Foremost Dairies, Inc., 151 F. Supp. 914, 923 (W. D. Ark. 1957).

have been able to charge had they not enjoyed a monopoly—all to the detriment of the public and patrons.

In paragraphs 14 and 16 of the complaints plaintiff alleges that it will be unable to obtain legitimate attractions and has suffered specific pecuniary damage. The prayers for relief demand treble damages, injunctions against inter- [fol. 44] ference with plaintiff's right to present theatre attractions and against defendants' alleged unlawful refusal to negotiate for such attractions.

The court is authorized by F. R. Civ. P. Rule 12(f) to order stricken from any pleading, upon motion, matter which is redundant, immaterial, impertinent, or scandalous. In *Slick Airways, Inc.* v. *American Airlines, Inc.*, 15 F. R. D. 175 (1954) Judge Forman aptly expressed the philosophy which this court's experience with antitrust actions leads us to believe should control:

> "... pleadings should not be whittled away where the material averred, while not strictly within a rigid interpretation of the rules, is helpful in outlining the background against which the action is laid, particularly where those allegations are factual and will not impose hardship upon the adverse party to answer or otherwise prejudice him. It is equally obvious that ... the injection of issues remote from the claim of the plaintiff can serve to lead into tributaries away from the main stream of litigation frustrating the purpose to reduce it to its simplest terms and avert unnecessary expenditures of large amounts of time, money and effort, usual concomitants of court controversies even when most expeditiously administered." (pp. 177-178).

For the reasons hereinafter stated we conclude that paragraphs 9 and 10 are remote from and immaterial to the claim of the plaintiff and should be stricken.

Treble damage actions are authorized to be commenced by persons *injured in their business or property* for the damages sustained by *them*.[21] A complaint in a private

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[21] 15 U. S. C. A. § 15.

civil antitrust action may not allege a violation of the statute and, *ipso facto*, claim damages generally. Specific injury suffered by the plaintiff, differing from that sus- [fol. 45] tained by the plaintiff as a member of the public, must be affirmatively alleged.[22]

The gist of the present complaints is that the defendants conspired to deprive the plaintiff of legitimate theatre attractions with resultant special damage to the plaintiff's business and injury to the public. The plaintiff seeks monetary and injunctive relief. It appears to us that paragraphs 9 and 10 allege a wholly different conspiracy without any affirmative allegation of consequent injury to the plaintiff's business. To the contrary the injury alleged is to the public. If such a conspiracy affecting the public interest does exist the party to take appropriate action under the antitrust laws in the public interest is the Attorney General, not the plaintiff. *Beegle* v. *Thomson*, 138 F. 2d 875 (7th Cir. 1943) precludes the plaintiff's self-appointment as the public's officer to end the alleged ticket selling conspiracy and to punish the alleged conspirators.

In oral argument plaintiff's counsel strongly urged that this conspiracy discouraged people from attending theatres. The complaints contain no such allegation and the contention of counsel is insufficient to show the "manner, nature, character and extent of the injury sustained" by the plaintiff or specific facts upon which damages might be assessed. *Beegle*, supra, p. 881.

The motions to strike will be granted. Counsel will settle and submit orders accordingly.

C. William Kraft, J.

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[22] Beegle v. Thomson, 138 F. 2d 875, 881 (7th Cir. 1943); Revere Camera Co. v. Eastman Kodak Co., 81 F. Supp. 325, 330-331 (N. D. Ill. 1948); Schwartz v. General Electric Co., 107 F. Supp. 58 (S. D. N. Y. 1952); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 80 F. Supp. 800, 805-806 (D. Del. 1948); Caldwell-Clements, Inc. v. McGraw-Hill Publ. Co., Inc., 12 F. R. D. 403, 405 (S. D. N. Y. 1952).

[fol. 46]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

ORDER TO TRANSFER—March 3, 1959

(E. D. Pa. No. 21,506)

Now, the 3rd day of March, 1959, upon consideration of the plaintiff's motion to transfer, conformably to 28 U. S. C. A. § 1406(a), filed January 20, 1959, the court finds it to be in the interest of justice to transfer to the United States District Court for the Southern District of New York this case against the following defendants: Select Operating Corporation, United Booking Office, Inc., Marcus Heiman, Milton Shubert, William Klein and Sylvia W. Golde, as individuals, and such transfer to the United States District Court for the Southern District of New York is now ordered.

It is further ordered that the motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, as individuals, and of Select Operating Corporation and United Booking Office, Inc. to dismiss for improper venue be and are denied.

C. William Kraft, Jr., United States District Judge.

[fol. 47]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

ORDER TO TRANSFER—March 3, 1959

(E. D. Pa. No. 22,092)

Now, the 3rd day of March, 1959, upon consideration of the plaintiff's motion to transfer, conformably to 28 U. S. C. A. § 1406(a), filed January 20, 1959, the court finds it to be in the interest of justice to transfer to the United States District Court for the Southern District of New York this case against the following defendants: Select Operating Corporation, United Booking Office, Inc., Marcus Heiman, Milton Shubert, William Klein and Sylvia W.

Golde, as individuals, and such transfer to the United States District Court for the Southern District of New York is now ordered.

It is further ordered that the motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, as individuals, and of Select Operating Corporation and United Booking Office, Inc. to dismiss for improper venue be and are denied.

C. William Kraft, Jr., United States District Judge.

[fol. 48]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 144-243

GOLDLAWR, INCORPORATED, Plaintiff,

v.

MILTON SHUBERT, WILLIAM KLEIN, SYLVIA W. GOLDE, MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.

AMENDED COMPLAINT.

Plaintiff above named brings this civil action against the defendants above named, complaining and alleging as follows:

1. Plaintiff, Goldlawr, Incorporated, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, engaged in the business of operating a theatre known as the Erlanger Theatre at 21st and Market Streets, Philadelphia, Pennsylvania.

2. Defendants are:

(a) Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman who are and have been

engaged in the theatre business in the Eastern District of Pennsylvania and elsewhere. Said Milton Shubert, William Klein and Sylvia W. Golde, together with their co-conspirator Lawrence Shubert Lawrence, are Executors and Trustees of the estate of Lee Shubert, Deceased, who was engaged in the theatre business in the Eastern District of Pennsylvania and elsewhere.

[fol. 49] (b) Select Operating Corporation, a corporation, which is one of the corporate instrumentalities dominated and controlled by the aforementioned defendants and their co-conspirators, Jacob J. Shubert, John Shubert and Lawrence Shubert Lawrence.

(c) United Booking Office, Inc., a corporation, which is engaged in the business of booking legitimate attractions in theatres throughout the United States.

3. The defendants at the time of the filing of this suit and prior thereto, together with their co-conspirators, Jacob J. Shubert, John Shubert, Lawrence Shubert Lawrence, Select Theatres Corporation, L. A. B. Amusement Corporation, Modern Theatre Corporation, Barrymore Theatre Corporation, and divers other individuals and corporate affiliates and subsidiaries, were engaged in the business of owning and operating theatres and presenting legitimate attractions therein throughout the United States, including the following theatres located in the City of Philadelphia: the Walnut Street Theatre, the Forrest Theatre, the Shubert Theatre and the Locust Theatre, and together with the aforesaid decedent, Lee Shubert, had been engaged in such operation continuously since prior to September 1, 1950.

4. Defendants, at the time of the filing of this suit and prior thereto, together with their co-conspirators referred to in paragraph 3, through their control and operation of the defendant United Booking Office, Inc., were engaged also in the business of booking legitimate attractions in theatres throughout the United States, including Philadelphia, and had been continuously since prior to September 1, 1950.

5. Defendants, at the time of the filing of this suit and prior thereto, together with their aforesaid co-conspirators, through their interest in the Theatre Guild, Inc. and the American Theatre Society, as well as in the production of [fol. 50] legitimate attractions by other producers, were engaged also in the production of legitimate attractions, and had been continuously since prior to September 1, 1950.

6. The theatre business consists of these three functions, production, booking and presentation of attractions in theatres. Because of their control and monopoly of the principal theatres in New York and elsewhere, including the theatres above referred to in the City of Philadelphia, and because of their domination, control and monopoly of booking of legitimate attractions both in New York and in Philadelphia and elsewhere throughout the United States, and because of their control over the production of legitimate attractions, the aforesaid defendants, together with their said co-conspirators, have been and are now able to and do control and monopolize the operation of theatres in the City of Philadelphia, the booking of legitimate attractions therein and the presentation of such attractions in said theatres, and have exercised and enjoyed such domination, control and monopoly continuously since prior to September 1, 1950.

7. Plaintiff's Erlanger Theatre is a fine, modern well-appointed and well-maintained theatre, equipped with a fine, large, well-designed stage, comfortable, modern seats, convenient of access with nearby parking facilities. It is superior to any of the theatres operated by defendants in the City of Philadelphia and better suited to the presentation of legitimate attractions of all types than said theatres.

8. Since prior to September 1, 1950, plaintiff has made repeated demands upon defendants and their co-conspirators and their booking offices to be permitted to present legitimate attractions in the Erlanger Theatre, but despite such demands, said defendants, together with their said co-conspirators, have refused to book attractions in the said theatre with a few minor exceptions, generally when defendants' Philadelphia theatres were all otherwise oc-

[fol. 51] cupied. The said defendants and their co-conspirators have likewise exerted pressure upon producers, by virtue of defendants' domination of production, booking and presentation of legitimate attractions, as set forth in this complaint, to prevent and restrain said producers from arranging and contracting with plaintiff to present attractions in plaintiff's Erlanger Theatre. The defendants and their co-conspirators are now engaged in the acts complained of in this paragraph and have been so engaged continuously since prior to September 1, 1950.

9. Defendants and their co-conspirators, in pursuance of said conspiracy and in order to obtain for themselves greater profit from their monopoly, have charged and are charging box office prices higher than would otherwise have been charged patrons if defendants had not enjoyed the monopoly alleged herein. Such actions have injured and are injuring the public and patrons of the theatres by causing them to pay higher prices for tickets than they would have paid if defendants had not had the hereinbefore alleged domination, monopoly and control. Said actions have injured and are injuring plaintiff because they cause many theatre patrons and prospective patrons to regard the theatre, including plaintiff's theatre, as an expensive form of entertainment, and have caused them to abandon the habit of regular theatre-going and to seek entertainment and recreation in other ways, thereby diminishing the number of patrons who attended plaintiff's theatre.

10. Defendants and their co-conspirators, in pursuance of said conspiracy and in order to obtain for themselves the maximum profit from their monopoly, aided by their aforesaid domination, control and monopoly and the virtual exclusion of plaintiff from the presentation of attractions, have conspired together with divers other persons, including ticket brokers, ticket scalpers and other such persons, to restrain the sale of tickets at the box offices of their said theatres at the regular box office price in order to compel [fol. 52] persons desiring to obtain such tickets to purchase the same from the said ticket brokers, ticket scalpers and other such persons at exorbitant prices far in excess of the

regular box office price to the detriment of the public interest and of the patrons purchasing said tickets. Defendants and their co-conspirators have allocated and are now allocating blocks of choice tickets to certain selected ticket agencies in Philadelphia, which agencies pay defendants and their co-conspirators sums of money over and above the theatre box office price for said tickets for each ticket so allocated. Said agencies charge members of the general public prices substantially in excess of the printed prices of tickets. Plaintiff has been injured by the above actions because the resultant difficulty in procuring tickets and the exorbitant prices charged for tickets have caused and are causing dissatisfaction among theatre patrons and prospective patrons with all legitimate theatres, including plaintiff's theatre, and have discouraged and are discouraging theatre attendance at plaintiff's theatre. As a result of the diversion of said tickets to the ticket brokers, ticket scalpers and such persons, the defendants have received substantial revenue over and above the box office price for the tickets, which revenues are directly attributable to defendants' domination, monopoly and control of the theatre business as hereinbefore alleged, and which conceal the actual earnings of said theatres.

11. Defendants and their co-conspirators, by their domination, monopoly and control, have stifled creative initiative and artistic development among producers and in the theatre, and have denied to the public attractions which would have been available if the said defendants had not enjoyed and exercised the monopoly control herein complained of and excluded plaintiff and others from the presentation of attractions.

12. The business of producing, booking and presenting legitimate attractions is interstate commerce. Attractions [fol. 53] generally are produced in New York, are then sent to Philadelphia, Boston, New Haven, Wilmington or elsewhere for trial showings, are then presented in New York for long periods and thereafter sent out for presentation throughout the United States.

13. The acts herein complained of are and have been continuously since prior to September 1, 1950 engaged in by

the defendants pursuant to a conspiracy to restrain and monopolize interstate commerce, in violation of the anti-trust laws of the United States, for the purpose of injuring and harming the public, particularly independent theatre operators, including plaintiff, and theatre patrons.

14. As a result of said conspiracy and the acts complained of, plaintiff has suffered irreparable injury and unless the conspiracy and acts complained of are enjoined, it will continue to suffer irreparable injury and will be unable to obtain legitimate attractions for plaintiff's Erlanger Theatre.

15. This action is brought under Sections 4 and 16 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes," as amended and supplemented (15 USCA 15, 26), commonly known as the Clayton Act, and under Sections 1 and 2 of the act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (15 USCA 1 and 2), said Act being commonly known as the Sherman Antitrust Act.

16. As a result of defendants' conspiracy and the acts herein alleged, plaintiff has suffered damages from September 1, 1950 to the commencement of this suit, in the sum of $1,050,000.00.

[fol. 54] Wherefore, plaintiff demands:

(a) that treble damages be awarded to plaintiff against defendants in the sum of $3,150,000.00, together with counsel fees and costs.

(b) That defendants and each of them be enjoined from conspiring or carrying out any acts or conduct pursuant to any conspiracy to interfere with plaintiff's right to present theatre attractions in a free and untrammeled market.

(c) That defendants be restrained from refusing to negotiate in good faith with plaintiff for the presentation of theatre attractions at plaintiff's Erlanger Theatre.

(d) That plaintiff have such other and further relief as shall be deemed just and proper.

Curtis, Mallet-Prevost, Colt & Mosle, By Wendell W. Forbes, 63 Wall Street, New York 5, New York, Member of the Firm, Attorneys for Plaintiff.

Of Counsel: Harld E. Kohn, Dolores Korman, Dilworth, Paxson, Kalish, Kohn & Dilks, 2635 Fidelity-Philadelphia Trust Building, Philadelphia 9, Pennsylvania.

[fol. 55]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 144-244

GOLDLAWR, INCORPORATED, Plaintiff,

v.

MILTON SHUBERT, WILLIAM KLEIN, SYLVIA W. GOLDE, MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.

AMENDED COMPLAINT

Plaintiff above named brings this civil action against the defendants above named, complaining and alleging as follows:

1. Plaintiff, Goldlawr, Incorporated, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, engaged in the business of operating a theatre known as the Erlanger Theatre at 21st and Market Streets, Philadelphia, Pennsylvania.

2. Defendants are:

(a) Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman who are and have been engaged in the theatre business in the Eastern District of

Pennsylvania and elsewhere. Said Milton Shubert, William Klein and Sylvia W. Golde, together with their co-conspirator Lawrence Shubert Lawrence, are Executors and Trustees of the estate of Lee Shubert, Deceased, who was engaged in the theatre business in the Eastern District of Pennsylvania and elsewhere.

[fol. 56] (b) Select Operating Corporation, a corporation which is one of the corporate instrumentalities dominated and controlled by the aforementioned defendants and their co-conspirators, Jacob J. Shubert, John Shubert and Lawrence Shubert Lawrence.

(c) United Booking Office, Inc., a corporation, which is engaged in the business of booking legitimate attractions in theatres throughout the United States.

3. The defendants at the time of the filing of this suit and prior thereto, together with their co-conspirators, Jacob J. Shubert, John Shubert, Lawrence Shubert Lawrence, Select Theatres Corporation, L. A. B. Amusement Corporation, Modern Theatre Corporation, Barrymore Theatre Corporation, and divers other individuals and corporate affiliates and subsidiaries, were engaged in the business of owning and operating theatres and presenting legitimate attractions therein throughout the United States, including the following theatres located in the City of Philadelphia: the Walnut Street Theatre, the Forrest Theatre, the Shubert Theatre and the Locust Theatre, and together with the aforesaid decedent, Lee Shubert, had been engaged in such operation continuously since prior to September 1, 1950.

4. Defendants, at the time of the filing of this suit and prior thereto, together with their co-conspirators referred to in paragraph 3, through their control and operation of the defendant United Booking Office, Inc., were engaged also in the business of booking legitimate attractions in theatres throughout the United States, including Philadelphia, and had been continuously since prior to September 1, 1950.

5. Defendants, at the time of the filing of this suit and prior thereto, together with their aforesaid co-conspirators, through their interest in the Theatre Guild, Inc. and the American Theatre Society, as well as in the production of [fol. 57] legitimate attractions by other producers, were engaged also in the production of legitimate attractions, and had been continuously since prior to September 1, 1950.

6. The theatre business consists of these three functions, production, booking and presentation of attractions in theatres. Because of their control and monopoly of the principal theatres in New York and elsewhere, including the theatres above referred to in the City of Philadelphia, and because of their domination, control and monopoly of booking of legitimate attractions both in New York and in Philadelphia and elsewhere throughout the United States, and because of their control over the production of legitimate attractions, the aforesaid defendants, together with their said co-conspirators, have been and are now able to and do control and monopolize the operation of theatres in the City of Philadelphia, the booking of legitimate attractions therein and the presentation of such attractions in said theatres, and have exercised and enjoyed such domination, control and monopoly continuously since prior to September 1, 1950.

7. Plaintiff's Erlanger Theatre is a fine, modern, well-appointed and well-maintained theatre, equipped with a fine, large, well-designed stage, comfortable, modern seats, convenient of access with nearby parking facilities. It is superior to any of the theatres operated by defendants in the City of Philadelphia and better suited to the presentation of legitimate attractions of all types than said theatres.

8. Since prior to September 1, 1950, plaintiff has made repeated demands upon defendants and their con-conspirators and their booking offices to be permitted to present legitimate attractions, in the Erlanger Theatre, but despite such demands, said defendants, together with their said co-conspirators, have refused to book attractions in the said theatre with a few minor exceptions, generally when de-

fendants' Philadelphia theatres were all otherwise occupied. The said defendants and their co-conspirators have likewise [fol. 58] exerted pressure upon producers, by virtue of defendants' domination of production, booking and presentation of legitimate attractions, as set forth in this complaint, to prevent and restrain said producers from arranging and contracting with plaintiff to present attractions in plaintiff's Erlanger Theatre. The defendants and their co-conspirators are now engaged in the acts complained of in this paragraph and have been so engaged continuously since prior to September 1, 1950.

9. Defendants and their co-conspirators, in pursuance of said conspiracy and in order to obtain for themselves greater profit from their monopoly, have charged and are charging box office prices higher than would otherwise have been charged patrons if defendants had not enjoyed the monopoly alleged herein. Such actions have injured and are injuring the public and patrons of the theatres by causing them to pay higher prices for tickets than they would have paid if defendants had not had the hereinbefore alleged domination, monopoly and control. Said actions have injured and are injuring plaintiff because they cause many theatre patrons and prospective patrons to regard the theatre, including plaintiff's theatre, as an expensive form of entertainment, and have caused them to abandon the habit of regular theatre-going and to seek entertainment and recreation in other ways, thereby diminishing the number of patrons who attended plaintiff's theatre.

10. Defendants and their co-conspirators, in pursuance of said conspiracy and in order to obtain for themselves the maximum profit from their monopoly, aided by their aforesaid domination, control and monopoly and the virtual exclusion of the plaintiff from the presentation of attractions, have conspired together with divers other persons, including ticket brokers, ticket scalpers and other such persons, to restrain the sale of tickets at the box offices of their said theatres at the regular box office price in order to compel persons desiring to obtain such tickets to purchase the same [fol. 59] from the said ticket brokers, ticket scalpers, and

other such persons at exorbitant prices far in excess of the regular box office price to the detriment of the public interest and of the patrons purchasing said tickets. Defendants and their co-conspirators have allocated and are now allocating blocks of choice tickets to certain selected ticket agencies in Philadelphia which agencies pay defendants and their co-conspirators sums of money over and above the theatre box office price for said tickets for each ticket so allocated. Said agencies charge members of the general public prices substantially in excess of the printed prices of tickets. Plaintiff has been injured by the above actions because the resultant difficulty in procuring tickets and the exorbitant prices charged for tickets have caused and are causing dissatisfaction among theatre patrons and prospective patrons with all legitimate theatres, including plaintiff's theatre, and have discouraged and are discouraging theatre attendance at plaintiff's theatre. As a result of the diversion of said tickets to the ticket brokers, ticket scalpers and such persons, the defendants have received substantial revenue over and above the box office price for the tickets, which revenues are directly attributable to defendants' domination, monopoly and control of the theatre business as hereinbefore alleged, and which conceal the actual earnings of said theatres.

11. Defendants and their co-conspirators, by their domination, monopoly and control, have stifled creative initiative and artistic development among producers and in the theatre, and have denied to the public attractions which would have been available if the said defendants had not enjoyed and exercised the monopoly control herein complained of and excluded plaintiff and others from the presentation of attractions.

12. The business of producing, booking and presenting legitimate attractions is interstate commerce. Attractions generally are produced in New York, are then sent to [fol. 60] Philadelphia, Boston, New Haven, Wilmington or elsewhere for trial showings, are then presented in New York for long periods and thereafter sent out for presentation throughout the United States.

13. The acts herein complained of are and have been continuously since prior to September 1, 1950 engaged in by the defendants pursuant to a conspiracy to restrain and monopolize interstate commerce, in violation of the anti-trust laws of the United States, for the purpose of injuring and harming the public, particularly independent theatre operators, including plaintiff, and theatre patrons.

14. As a result of said conspiracy and the acts complained of, plaintiff has suffered irreparable injury and unless the conspiracy and acts complained of are enjoined, it will continue to suffer irreparable injury and will be unable to obtain legitimate attractions for plaintiff's Erlanger Theatre.

15. This action is brought under Sections 4 and 16 of the Act of Congress of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes," as amended and supplemented (15 USCA 15, 26), commonly known as the Clayton Act, and under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (15 USCA 1 and 2), said Act being commonly known as the Sherman Antitrust Act.

16. As a result of defendants' conspiracy and the acts herein alleged, plaintiff has suffered damages from September 1, 1950 to the commencement of this suit, in the sum of $1,050,000.00.

Wherefore, plaintiff demands:

(a) that treble damages be awarded to plaintiff against defendants in the sum of $3,150,000.00, together with counsel fees and costs.

[fol. 61] (b) That defendants and each of them be enjoined from conspiring or carrying out any acts or conduct pursuant to any conspiracy to interfere with plaintiff's right to present theatre attractions in a free and untrammeled market.

(c) That defendants be restrained from refusing to negotiate in good faith with plaintiff for the presentation of theatre attractions at plaintiff's Erlanger Theatre.

(d) That plaintiff have such other and further relief as shall be deemed just and proper.

Curtis, Mallet-Prevost, Colt & Mosle, By Wendell W. Forbes, Member of the Firm, 63 Wall Street, New York 5, New York, Attorneys for Plaintiff.

Of Counsel: Harold E. Kohn, Dolores Korman, Dilworth, Paxson, Kalish, Kohn & Dilks, 2635 Fidelity-Philadelphia Trust Building, Philadelphia 9, Pennsylvania.

[fol. 62]

NOTICE OF MOTION UNDER RULE 25(a)(1)

(Same Motion Filed in S. D. N. Y. #144-243 and #144-244)

Please Take Notice that the undersigned will move this Court at a motion term thereof to be held in Room 506, United States Courthouse, Foley Square, New York, N. Y., on May 21, 1959, at 10:00 A. M., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure substituting Guaranty Trust Company of New York, N. Y. and Asher Levi of Palm Springs, California, Executors of the last will of Marcus Heiman, duly appointed and qualified as such by the Surrogate's Court of the State of New York, New York County, as party defendants herein in place of Marcus Heiman, one of the original defendants, whose death occurred on September 9, 1957; and for a further order changing the title of this action accordingly.

Dated: New York, N. Y., May 11, 1959.

Curtis, Mallet-Prevost, Colt & Mosle, By Winthrop R. Munyan, Member of the Firm, Attorneys for Plaintiff, 63 Wall Street, New York 5, New York.

Of Counsel: Harold E. Kohn, Dolores Korman, Dilworth, Paxson, Kalish, Kohn & Dilks, 2635 Fidelity-Philadelphia Trust Bldg., Philadelphia 9, Pennsylvania.

[fol. 63] To: Milton Shubert, 40 Central Park South, New York, New York; William Klein, 30 East 72nd Street, New York, New York; Sylvia W. Golde, 176 East 77th Street, New York, New York; United Booking Office, Incorporated, 234 West 44th Street, New York, New York; Select Operating Corporation, 234 West 44th Street, New York, New York; Guaranty Trust Company of New York, 524 Fifth Avenue, New York, New York; Asher Levy, Palm Springs, California.

[fol. 64]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION (Both Appeals)—August 10, 1959

(Filed Jointly in S. D. N. Y. Actions #144-243 and #144-244)

PALMIERI, J.

This is an antitrust action originally instituted on October 17, 1956 by plaintiff against various persons and corporations in the Federal District Court for the Eastern District of Pennsylvania. That Court retained the action as to defendants found to be properly before it and, on March 3, 1959, ordered the action transferred to this Court as to the above-named defendants for lack of proper venue in Pennsylvania. Motions filed here by defendants subsequent to transfer will be discussed seriatim.

I.

Motion of Defendants Select Operating Corporation and United Booking Office, Inc. to Dismiss for Lack of Jurisdiction.

Select Operating Corporation and United Booking Office, Inc. are incorporated and have their offices in New York. Plaintiff, claiming the right to extraterritorial process under Section 12 of the Clayton Act, 38 Stat. 736 (1914), 15 U. S. C. § 22 (1958), served these defendants in New York, by alias summons, in February and March of 1957.

Defendants immediately moved to quash the returns of service of the summons and to dismiss for lack of jurisdiction and improper venue. In an opinion dated December 22, 1958, 169 F. Supp. 677, the Court in Pennsylvania held that venue was improper, finding that defendants were not inhabitants of or found in Pennsylvania, and did not transact business there as required by Section 12 of the Clayton Act. Transfer was ordered without ruling upon the motions to dismiss for lack of personal jurisdiction.

[fol. 65] Service of the alias summons was the only service of process ever received by either defendant in this District. Therefore, the first question presented is whether, under Section 12 of the Clayton Act, the extra-territorial service of process while the action was pending in Pennsylvania had the effect of giving this Court, on transfer, personal jurisdiction over the defendants.

Section 12 provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

If the service purported to be made under this section was effective to give the Court in Pennsylvania personal jurisdiction, such jurisdiction would continue after transfer. See Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949). In order to sustain jurisdiction in Pennsylvania, however, the clause of Section 12 dealing with process would have to be read as wholly independent of the clause dealing with venue. If so read, the extra-territorial service would give the Court in Pennsylvania jurisdiction; the only defect would be improper venue. *Petroleum Financial Corp.* v. *Stone*, 116 F. Supp. 426, 428 (S. D. N. Y. 1953) (dictum), Note, 38 Minn. L. Rev. 874 (1954).

The language of the section itself precludes the interpretation set forth above. By the phrase "all process *in*

such cases" (emphasis supplied), the privilege of extraterritorial service is expressly confined to actions brought in a district in which the corporation is an inhabitant, found, or transacting business. *Dazian's, Inc.* v. *Switzer Bros.*, 141 F. Supp. 648 (N. D. Ohio 1951); *Midwest Fur Producers Ass'n* v. *Mutation Mink Breeders Ass'n*, 102 F. [fol. 66] Supp. 649 (D. Minn. 1951); *Reid* v. *University of Minnesota*, 107 F. Supp. 439 (N. D. Ohio 1952); *cf. Greenberg* v. *Giannini*, 140 F. 2d 550 (2d Cir. 1944); *Lavin* v. *Lavin*, 182 F. 2d 870, 873 (2d Cir. 1950) (dictum). That the Pennsylvania forum is not such a District is no longer in dispute. Therefore plaintiff cannot invoke Section 12 of the Clayton Act to legitimatize the extraterritorial service. The Court in Pennsylvania never acquired personal jurisdiction over the defendants, and this Court did not acquire personal jurisdiction as a result of the transfer.

Nor was personal jurisdiction obtained in this District by virtue of the fact that the alias summons was delivered in New York. Service made without statutory authority is of no effect regardless of actual notice to defendants. *Cf. Wuchter* v. *Pizzuti*, 276 U. S. 13 (1928).

This Court now lacks personal jurisdiction over the defendants since effective service of process has never been accomplished. However, if the transfer to this District were authorized, plaintiff might still be in a position to avoid dismissal by making proper service upon defendants without further delay. See *UNRRA* v. *The Mormacpine*, 99 F. Supp. 552 (S. D. N. Y. 1951); 5 Moore, Federal Practice § 41.11 at p. 1039 (2d ed. 1951). Therefore, the second question to be determined on this motion is whether a Court, lacking jurisdiction over defendants, may nonetheless transfer the action to a District where service can be effected.

This issue, requiring interpretation of the transfer provisions of the Judicial Code, 28 U. S. C. §§ 1404(a), 1406(a) (1952), is one on which the Courts are in disagreement. *Independent Productions Corp.* v. *Loew's, Inc.*, 148 F. Supp. 460 (S. D. N. Y. 1957); *McDaniel* v. *Drotman*, 103 F. Supp. 643 (W. D. Ky. 1952); *Wilson* v. *Kansas City So. Ry.*, 101 F. Supp. 56 (W. D. Mo. 1951); *Fistel* v. *Beaver Trust Co.*, 94 F. Supp. 974 (S. D. N. Y. 1950) (transfer may be made only by a court which has personal jurisdiction). *Inter-*

natio-Rotterdam, Inc. v. *Thomsen*, 218 F. 2d 514 (4th Cir.), [fol. 67] 68 Harv. L. Rev. 1069 (1955) (admiralty); *Orzulak* v. *Federal Commerce and Navigation Co.*, 168 F. Supp. 15 (E. D. Pa. 1958) (admiralty); *United States* v. *Welch*, 151 F. Supp. 899 (S. D. N. Y. 1957); *Petroleum Financial Corp.* v. *Stone*, 116 F. Supp. 426 (S. D. N. Y. 1953); *Lumbermens Mut. Cas. Co.* v. *Mohr*, 87 F. Supp. 727 (S. D. Texas 1949) (transfer may be made by a court which lacks personal jurisdiction). Section 1406(a), authorizing transfer when venue is improperly laid, provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Section 1404(a), since it applies when venue is proper but the forum in which the action is brought is inconvenient, is not directly involved in this action. It is appropriate to note, however, that the Courts have not drawn a distinction between the two sections in regard to the propriety of transfer by a Court which lacks jurisdiction. *E.g.*, *Petroleum Financial Corp.* v. *Stone*, *supra*, 42 Geo. L. J. 315, 318 (1954).

This Court is of the view that Section 1406(a), which by its terms speaks to defective venue only, cannot be made to do service when there is also a jurisdictional defect. Proper jurisdiction is the more basic requirement. See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167-168 (1939). The drafters of the Judicial Code made an express provision for transfer in the event of improper venue. They made no express provision for transfer in the event of lack of jurisdiction. It is unlikely that the drafters relied upon a venue section to carry along an implicit provision for transfer to cure a jurisdictional defect. See Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949); Notes 38 Minn. L. Rev. 874, 23 U. Cinn. L. Rev. 357, 359 (1954).

[fol. 68] It should be noted that *Schiller* v. *Mit-Clip Co.*, 180 F. 2d 654 (2d Cir. 1950), which has been cited as au-

thority for the propriety of transfer when jurisdiction in *personam* could not be had in the transferor forum, *United States* v. *Welch*, 151 F. Supp. 899 (S. D. N. Y. 1957); *Petroleum Financial Corp.* v. *Stone, supra;* 68 Harv. L. Rev. 1069, 1070 (1955), never reached the question. In that case plaintiff resisted and defendant argued in support of transfer. The Court of Appeals, in denying plaintiff's petition for a mandamus to compel the district judge to revoke the transfer order, stated: " . . . [T]he plaintiff cannot complain because he has not suffered the dismissal which he so richly deserved. . . . Whether we should have any jurisdiction, either by appeal or by mandamus, to review such an order, we need not decide." 180 F. 2d at 655.

On the reasoning set forth above it is concluded that the Court in Pennsylvania improperly transferred the action as to defendants Select Operating Corporation and United Booking Office, Inc. to this Court. Since there is nothing to support the pendency of the action here, it must be dismissed. *E.g., Wilson* v. *Kansas City So. Ry.*, 101 F. Supp. 56 (W. D. Mo. 1951). The alternative, remand to the transferor district, would serve no useful purpose because plaintiff's inability to proceed against these defendants in the Pennsylvania forum has already been established. See *Goldlawr* v. *Shubert*, 169 F. Supp. 677, 686 (1958).

II.

Motion to Substitute the Executors of the Estate of Defendant Heiman

Cross-Motion to Dismiss as to Heiman for Lack of Jurisdiction

Marcus Heiman, a New York resident, was named as an original defendant in the action instituted in Pennsylvania. Although he died in September of 1957, the order [fol. 69] of March 1959 included Heiman among the defendants as to whom the action was transferred for lack of venue.

Heiman was not found in and had no agents in Pennsylvania. *Goldlawr* v. *Shubert*, 169 F. Supp. 677, 682 (1958). See Clayton Act § 4, 38 Stat. 731 (1914), 15 U. S. C.

§ 15 (1958). He was never served personally in Pennsylvania or any other place. The obvious lack of personal jurisdiction over Heiman and the resulting invalidity of the transfer under 28 U. S. C. § 1406(a) would alone impel this Court to grant the cross-motion to dismiss.

In addition, passing consideration of the cross-motion, it is doubtful whether Rule 25(a)(1), Fed. R. Civ. P., may be invoked to authorize substitution of the executors for a defendant who neither appeared nor was served with process. See *United States* v. *Field*, 25 Fed. Cas. 1067, No. 15,089 (C. C. S. D. N. Y. 1859), Note on Revivor, 14 Fed. 392 (1882); *cf. Carnes* v. *Strait*, 270 S. W. 2d 920 (Ark. 1954). Substitution at this late date would be particularly anomalous since the motion to transfer from Pennsylvania was interposed for the first time after Heiman's death. Therefore at no time during his life was he amenable to service of process in this action.

III.

Motions to Dismiss for Pendency of Another Action

The original complaint in this action was filed in October of 1956. In February of 1957 plaintiff, who was unable to obtain a prompt hearing on its motion to amend, filed a second complaint. This second complaint added certain defendants and extended the period for which damages were claimed but was otherwise identical with the first complaint. Therefore when the Court in Pennsylvania ordered severance and transfer, two actions, identical in all respects, were docketed in this District, the first of the Pennsylvania complaints having, in the meantime, been amended.

[fol. 70] The three remaining defendants, William Klein, Milton Shubert, and Sylvia W. Golde have moved for a dismissal of one of these actions on the ground that there is a similar action pending. Plaintiff opposes the motion on the ground that its rights under the Statute of Limitations can best be protected by preserving both actions.

In order to protect plaintiff's interest and, at the same time, spare defendants the burden of duplicating their efforts in this cause, the two actions will be consolidated for

the purpose of all further proceedings. See Rule 42(a), Fed. R. Civ. P.

Settle appropriate orders on notice for dismissal as to defendants Select Operating Corporation, United Booking Office, Inc., and Marcus Heiman and for consolidation of the actions against Milton Shubert, William Klein and Sylvia W. Golde.

Dated: New York, N. Y., August 10, 1959.

Edmund L. Palmieri, U. S. D. J.

[fol. 71]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER (BOTH APPEALS)—January 27, 1960

(Filed Jointly in S. D. N. Y., actions 144-243 and 144-244.)

And Now, this 27th day of January, 1960, upon consideration of the motions of defendants Select Operating Corporation and United Booking Office, Inc., to dismiss for lack of jurisdiction, the plaintiff's motion to substitute the Executors of the Estate of Marcus Heiman, and the cross-motion to dismiss as to defendant Marcus Heiman for lack of jurisdiction, and upon the record and arguments thereon, it is hereby ordered and decreed:

1. That the motions of the defendants Select Operating Corporation and United Booking Office, Inc. in each of the above-entitled actions to dismiss the complaints as against them for lack of jurisdiction over the persons of such defendants, be, and the same hereby are granted.

2. That the motion of the Executors of the Estate of Marcus Heiman, deceased, to dismiss as to Marcus Heiman for lack of jurisdiction over the person of such defendant, be, and the same hereby is granted, and that the motion of the plaintiff to substitute the Executors of the Estate of Marcus Heiman, deceased, as party defendants in place of Marcus Heiman, be denied.

3. In view of the order of the Court of Appeals for the Second Circuit, dated January 18, 1960, vacating the

judgment of September 1, 1959, it is the opinion of this Court that the order dismissing the action as to Select Operation [sic] Corporation, United Booking Office, Inc. and Marcus Heiman and denying the motion of the plaintiff to substitute the Executors of the Estate of Marcus Hei-
[fol. 72] man, deceased, as parties defendant, involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Edmund L. Palmieri, U. S. D. J.

[fol. 73]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 26211, 26212

GOLDLAWR, INC., Plaintiff-Appellant,

against

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants-Appellees,

and

MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, Defendants.

Appendix of Morgan Guaranty Trust Company of New York and Asher Levy, Executors of the Estate of Marcus Heiman, Deceased

[fol. 73a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 144-243

GOLDLAWR, INCORPORATED, Plaintiff,

against

MILTON SHUBERT, et al., Defendants.

Civil Action No. 144-244

GOLDLAWR, INCORPORATED, Plaintiff,

against

MILTON SHUBERT, et al., Defendants.

NOTICE OF CROSS-MOTION DATED JUNE 4, 1958 OF MORGAN GUARANTY TRUST COMPANY OF NEW YORK AND ASHER LEVY, EXECUTORS OF ESTATE OF MARCUS HEIMAN TO DISMISS

Sirs:

Please Take Notice that the undersigned appearing specially and not generally on behalf of Morgan Guaranty [fol. 74] Trust Company (formerly known as Guaranty Trust Company of New York) and of Asher Levy will cross move this Court at the Motion Term thereof to be held in room 506, United States Courthouse, Foley Square, New York, N. Y., on June 18, 1959 at 10:00 a.m. of that day or as soon thereafter as counsel can be heard for an order dismissing the above entitled actions as to the named defendant Marcus Heiman on the grounds that

(1) No jurisdiction of the person of Marcus Heiman was ever obtained;

(2) The United States District Court for the Eastern District of Pennsylvania lacked personal jurisdiction over the named defendant Marcus Heiman and therefore was without power to order a transfer to this District as to him;

(3) As the United States District Court for the Eastern District of Pennsylvania was without power to order a transfer as to Marcus Heiman, this Court is without jurisdiction;

(4) No service of process has ever been made upon Morgan Guaranty Trust Company (formerly Guaranty Trust Company of New York) and Asher Levy as Executors of the estate of Marcus Heiman, deceased, either prior to, or subsequent to the transfer of these actions from the United States District Court for the Eastern District of Pennsylvania to this Court;

or in the alternative, for an order dismissing one of the above actions on the ground that they are identical and for such other and further relief as to the Court may seem just and proper in the premises.

[fol. 75] Please Take Further Notice that the affidavits of Arnold Lewis and Aaron Lipper in support of the foregoing are also being submitted in opposition to the plaintiff's motions under Rule 25(a) for an order substituting Guaranty Trust Company of New York and Asher Levy as Executors of the estate of Marcus Heiman, deceased, in place of the defendant Marcus Heiman.

Dated: New York, N. Y., June 4, 1959.

Yours, etc.

Lipper, Shinn & Keeley, by Aaron Lipper, Attorneys for Morgan Guaranty Trust Company (formerly Guaranty Trust Company of New York)

and

Asher Levy, Executors under the Last Will and Testament of Marcus Heiman, Deceased, Appearing Specially Herein, Office & P. O. Address, 41 East 42nd Street, New York 17, New York, MUrray Hill 2-5780.

To:

Curtis, Mallet-Prevost, Colt & Mosle, Esqs., Attorneys for Plaintiff, 63 Wall Street, New York 5, New York.

[fol. 76]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AFFIDAVITS OF ARNOLD LEWIS, ASSISTANT TRUST OFFICER OF MORGAN GUARANTY TRUST COMPANY OF NEW YORK AND AARON LIPPER SUBMITTED IN SUPPORT OF CROSS-MOTION AND IN OPPOSITION TO MOTIONS OF APPELLANT TO SUBSTITUTE THE EXECUTORS PURSUANT TO RULE 25 (A)

State of New York,
County of New York, ss.:

Arnold Lewis, being duly sworn, deposes and says:

1. I am Assistant Trust Officer of Morgan Guaranty Trust Company of New York (formerly Guaranty Trust Company of New York), which company together with Asher Levy are the Executors of the Estate of Marcus Heiman who died on September 9, 1957. Letters testamentary were issued by the Surrogate's Court of New York County on October 1, 1957. This affidavit is being submitted in opposition to the application of the plaintiff in the above actions to substitute the Executors as parties defendant in the above litigations in place of the aforesaid Marcus Heiman, whose death occurred on September 9, 1957, and in support of an application to dismiss the actions for the reasons set forth in the foregoing notice of motion.

[fol. 77] 2. Since the death of the deceased, Marcus Heiman on September 9, 1957 and the Morgan Guaranty Trust Company qualifying as one of the Executors of the Estate of Marcus Heiman, deceased, no papers of any name, nature or description have ever been served or filed upon the trust company or the Co-executor, Asher Levy, by Goldlawr, Inc., the plaintiff herein or anyone on its behalf. Although more than twenty months have elapsed since the death of Marcus Heiman, no steps were taken by the plaintiff or its attorneys to substitute the Executors in any litigation until the present application was made. Although we had been informed by Lipper, Shinn & Keeley, Esqs., attorneys for the Estate of Marcus Heiman, that the deceased, Marcus Heiman, was named

as a party defendant in an antitrust litigation pending in the United States District Court for the Eastern District of Pennsylvania, no formal notice of the pendency of the suit was filed with the trust company by the plaintiff or its attorneys. As appears from the annexed affidavit of Aaron Lipper, no valid service of a summons and complaint was made upon Marcus Heiman in his lifetime, either within or without the territorial jurisdiction of the United States District Court for the Eastern District of Pennsylvania.

3. Other than the service upon the trust company of the notices of motion under Rule 25(a) on May 12, 1959, no other papers were ever served. Specifically, no summons and complaint in this litigation was ever served upon the trust company or the Co-executor, Asher Levy. Indeed, the notice served upon us herein only recites the name of "Milton Shubert" as the defendant in the title of the actions and does not set forth any other name and we are assuming that it has reference to the antitrust case.

[fol. 78] 4. Your deponent respectfully prays that the above actions be dismissed for the reasons set forth in the annexed affidavit of Aaron Lipper and upon the grounds set forth in the notice of motion herein and that plaintiff's motion to substitute the Executors in place of Marcus Heiman be denied.

Arnold Lewis

(Sworn to by Arnold Lewis on June 3rd, 1959.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York,
County of New York, ss.:

Aaron Lipper, being duly sworn, deposes and says:

1. I am a member of the firm of Lipper, Shinn & Keeley, attorneys for Morgan Guaranty Trust Company of New York (formerly Guaranty Trust Company of New York) and Asher Levy, Executors under the Last Will and Testament of Marcus Heiman, deceased, who are appearing

specially and not generally on behalf of the said Executors. I am submitting this affidavit on their behalf in opposi-
[fol. 79] tion to the motions of the plaintiff dated May 11, 1959 to substitute the said Executors as parties defendant in place of Marcus Heiman and in support of the cross motion dated June 4, 1959 to dismiss these actions for jurisdictional reasons as set forth in the notice of motion.

2. Marcus Heiman died a resident of New York County on September 9, 1957—over twenty months ago. Letters testamentary were issued to the Executors by the Surrogate's Court, New York County, on October 1, 1957.

3. I have had examined the filed papers in the actions instituted in the United States District Court for the Eastern District of Pennsylvania and the papers transferred to this Court. From such examination and from talks had with the decedent prior to his death, it appears unequivocally that Marcus Heiman was never personally served with a summons and complaint in these actions within or without the territorial jurisdiction of the United States District Court for the Eastern District of Pennsylvania; and no summons and complaint was ever served upon the decedent. The United States District Court for the Eastern District of Pennsylvania never acquired jurisdiction over the person of Marcus Heiman.

4. For all intents and purposes the plaintiff and its attorney recognized that the Philadelphia Court never had jurisdiction over the person of Marcus Heiman. Harold E. Kohn on behalf of the plaintiff filed a 32-page affidavit sworn to June 12, 1957 and a 12-page brief in opposition to the motion of Marcus Heiman appearing specially and the other defendants to dismiss for lack of jurisdiction
[fol. 80] over their person and for improper venue. Not a word in the 32-page affidavit or in the 12-page brief refers to Marcus Heiman or to a claim that the Court had jurisdiction over the person of Marcus Heiman. During the more than two years that the case was pending in the United States District Court for the Eastern District of Pennsylvania, the plaintiff for all practical purposes failed to

proceed against the deceased and no motion of any kind was made to substitute the Executors of Mr. Heiman's estate as parties defendant in the Philadelphia lawsuit.

5. The filed papers do show a return of service of the United States Marshal on file in this Court with respect to a purported service on Marcus Heiman stating that

> "I hereby certify and return that * * * on November 7, 1956 at 209 Quince Street, Philadelphia, Pennsylvania, I served the same (summons and complaint) on the within named defendant (Marcus Heiman) by leaving copies thereof on the desk of woman in charge of office who refused to give name or title".

On November 26, 1956 on behalf of the decedent, Marcus Heiman, a motion was made by his Philadelphia attorneys, appearing specially and not generally, to quash the service of the summons and complaint and to dismiss the complaint for lack of jurisdiction over the person of Marcus Heiman. A motion to dismiss for improper venue was concurrently made. A copy of the said motion to dismiss for lack of jurisdiction is annexed herewith as Exhibit 1 and the motion to dismiss for improper venue is annexed as Exhibit 2. The affidavit of Marcus [fol. 81] Heiman, sworn to November 19, 1956, showing that he was never served with any summons and complaint and that he never had any office at the place indicated is annexed herewith as Exhibit 3. As above set forth, plaintiff and its counsel recognized that the Court had no jurisdiction over him and acquiesced in the decedent Heiman's contention. Plaintiff made no effort whatsoever to dispute the claim of no jurisdiction.

6. On December 22, 1958, Judge William Kraft, Jr., filed his opinion which is now officially reported at 169 Fed. Supp. page 677, in which, among other things, he wrote at pages 681, 682:

p. 681:

> "Plaintiff does not contest the averments in the remaining individual defendants' affidavits (includ-

ing Marcus Heiman) that each resided in New York and, since none of them was *found* here, we must determine whether any of them had *an agent* here

• • •

p. 682:

The evidence does not persuade us, however, that any other of the moving individual defendants (including Marcus Heiman) had an agent within this district.

Accordingly, the motions of Lawrence and J. J. Shubert in 21506 and 22092 and of John Shubert to dismiss for improper venue in 22092 will be denied. *The motions* of Milton Shubert, William Klein, Sylvia W. Golde, and *Marcus Heiman,* individually, in each [fol. 82] action, will be granted". (Emphasis and parentheses ours.)

Specifically, Judge Kraft made no mention of the motion made on behalf of Marcus Heiman to dismiss the action for lack of jurisdiction over the person. The findings set forth in Judge Kraft's opinion and recited above indicate that the Court did not have jurisdiction over the person of Marcus Heiman. Had Judge Kraft not dismissed for improper venue, he would have for lack of jurisdiction.

7. Notwithstanding his published opinion of December 22, 1958 (which has never been recalled), Judge Kraft signed the order of transfer to this Court without making any disposition as to the application of Marcus Heiman to dismiss as to him for lack of jurisdiction over his person. This undoubtedly was brought about by a letter from plaintiff's counsel to Judge Kraft dated March 2, 1952 in which he states:

"2. The problem of service in New York likewise is of no moment to the issue here. Service, of course, will have to be made in New York on the defendants as against whom the action is transferred. Problems incident to such service and to the substitution of personal representatives will be decided in the Southern District, if and when they arise".

8. Since Marcus Heiman was not personally served within the territorial limit of the United States District Court for the Eastern District of Pennsylvania and since that Court in its opinion of December 22, 1958 found that Marcus Heiman had no agent there, that Court never ac-[fol. 83] quired jurisdiction over the person of Marcus Heiman. Since that Court did not have jurisdiction over the person of Marcus Heiman, no valid proceedings could take place at least as to him. The order of transfer to this Court of March 3, 1959 was therefore improper, ineffective and void as to Marcus Heiman.

9. No service of a summons and complaint out of this Court has ever been made upon Marcus Heiman, the deceased, or the Morgan Guaranty Trust Company of New York (formerly Guaranty Trust Company of New York) or on Asher Levy, his Executors. The jurisdiction of this Court over this litigation as to the decedent rests upon the order of transfer dated March 3, 1959. That order and transfer is void and ineffective as to the decedent, Marcus Heiman. This Court likewise has no jurisdiction and cannot obtain jurisdiction over his Executors with respect to these actions.

Plaintiff has not even complied with Rule 25(a) of the Federal Rules of Civil Procedure. It has not personally served the notice of motion dated May 11, 1959 on Asher Levy nor has plaintiff served copies of the summons and complaint on either Asher Levy or the Morgan Guaranty Trust Company of New York.

Wherefore, your deponent respectfully prays that the Court deny plaintiff's motion to substitute Morgan Guaranty Trust Company of New York and Asher Levy as parties defendant in place of Marcus Heiman and to dismiss this action as to Marcus Heiman for lack of jurisdiction over the person of Marcus Heiman.

Aaron Lipper

(Sworn to by Aaron Lipper, June 4th, 1959.)

[fol. 83a]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No. 21506

GOLDLAWR, INCORPORATED, Plaintiff,

—vs.—

JACOB J. SHUBERT and LAWRENCE SHUBERT LAWRENCE, MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, individually and as Trustees of the Estate of Lee Shubert, Deceased, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, SELECT OPERATING CORPORATION and L. A. B. AMUSEMENT CORPORATION, Defendants.

State of New York,
County of New York, ss.:

Marcus Heiman, being duly sworn, deposes and says:

1. I am one of the persons described as a defendant in this action.

2. I have never been a resident of nor domiciled in the State of Pennsylvania or the Eastern District of Pennsylvania. For many years I have been a resident and domiciliary of the City and State of New York, and reside at 24 West 55th Street, New York, New York.

3. I was not served in the State of Pennsylvania, in the Eastern District of Pennsylvania or in any other jurisdiction with any process in this case.

[fol. 83b] 4. I do not, nor did I on the date of the alleged service of process in this case, transact any business in the State of Pennsylvania or the Eastern District of Pennsylvania, and do not, nor did I on the date of the alleged service of process in this case, have any agent or representative in said jurisdictions. The Forrest Theatre offices on Quince Street, Philadelphia, are not my offices and no

person employed therein or any other person is or has at any time been my agent or representative in the State of Pennsylvania or the Eastern District of Pennsylvania, and no person in the State of Pennsylvania or the Eastern District of Pennsylvania ever had any authority, or has ever been authorized, to accept service of process on my behalf.

Sworn to before me this 19th day of November, 1956.

Marcus Heiman

Mildred Lebon, Notary Public, State of New York, No. 03-7463600, Qualified in Bronx County, Commission Expires April 30, 1963.

(Notarial Seal)

[fol. 84]

UNITED STATES DISTRICT COURT

SOUTHERN DISTR'CT OF NEW YORK

REPLY AFFIDAVIT OF AARON LIPPER SWORN TO JULY 17TH 1959 IN CONNECTION WITH THE SAME MOTIONS

State of New York,
County of New York, ss.:

Aaron Lipper, being duly sworn, deposes and says: I am a member of the firm of Lipper, Shinn & Keeley, attorneys for the estate of Marcus Heiman. I have personal knowledge of the facts involved in the administration of the decedent's estate. Were it not for this litigation, the distribution of the assets of the estate of Marcus Heiman would have been completed and all of the provisions of the Last Will and Testament of Marcus Heiman carried out.

1. The decedent Marcus Heiman died in New York County on September 9, 1957. Letters testamentary were issued on October 1, 1957 by the Surrogate's Court, New York County, to the Morgan Guaranty Trust Company (formerly Guaranty Trust Company of New York) and Asher Levy. An ancillary administration proceeding was instituted in the Superior Court for the State of California and ancillary letters testamentary were issued to Asher

Levy by that court on February 26, 1958. The main estate asset was known as the Biltmore Theatre property in the [fol. 85] State of California and it was necessary to have the ancillary proceeding therein so that the estate asset could be properly liquidated and the California estate tax paid.

2. All of the California assets were liquidated on October 6, 1958; the California estate tax was paid and a final accounting of Asher Levy was duly settled and approved by the Califoria court on May 29, 1959.

3. In the New York estate proceeding, practically all of the assets were liquidated and reduced to cash; the proceeds were invested in short term government securities; the decedent's cooperative apartment was sold; the specific legacies of items of personal property were turned over to the beneficiaries named therein in the decedent's will; various of the general cash legacies of $10,000.00 were paid upon bonds being furnished by the beneficiaries; general legacy of $25,000.00, representing the decedent's insurance was paid to the beneficiary thereof; the federal estate tax return was filed with the Director of Internal Revenue on December 9, 1958 and the estimated tax of $109,787.11 was paid although the return has not as yet been audited; the New York State estate tax return was filed with the Department of Taxation and the estimated tax due thereon paid but the return has not as yet been audited.

4. Under the terms of paragraph "Nineteenth" of the decedent's will, the residuary estate of the decedent was left in trust as follows:

> "NINETEENTH: All the rest, residue and remainder of my estate, of whatsoever kind or nature and wheresoever situated, of which I may die seized or possessed, or to which I am in any manner entitled [fol. 86] at the time of my death, I give, devise and bequeath to my Trustees, hereinafter named, IN TRUST HOWEVER, to hold, manage, invest and reinvest the same and to collect and receive the income, dividends and profits therefrom during the lives of my sisters,

Rose Grody and Anna Shimberg, and of the survivor of them, and after paying all costs and expenses properly chargeable against the same, to pay the net income, in equal shares, to my sisters, Sadie Kelson, Anna Shimberg and Rose Grody, and to the survivor or survivors of them, during the continuance of this trust.

Upon the death of both my sister Anna Shimberg and my sister Rose Grody, the said trust shall cease and terminate and I direct my Trustees to pay over the sum of Fifty Thousand ($50,000.00) Dollars to my sister Sadie Kelson, if she shall then be living, and to pay over the balance of said principal (or the entire principal, if my said sister Sadie Kelson shall not then be living) as follows:

80% thereof to such religious, charitable, scientific, literary or educational organizations located in the City of Syracuse, New York, as my Trustees, in their absolute judgment and discretion select, in memory of my deceased parents, Celia and Isaac Heiman; it is my wish that in making such selection, at least thirty-three and one third (33⅓%) per cent of said amount shall be given to Jewish educational and charitable organizations. In the selection of institutions which are to receive the principal hereunder, I further direct my Trustees to select only non-profit institutions, organized [fol. 87] and operated exclusively for religious, charitable, scientific, literary or educational purposes within the meaning of Section 812, Subsection (d) of the Internal Revenue Code.

20% thereof to such religious, charitable, scientific, literary or educational organizations located in the City of Syracuse, New York, as my Trustees, in their absolute judgment and discretion select, in memory of my deceased nephew, William Heiman Grody; it is my wish that in making such selection, at least thirty-three and one third (33⅓%) per cent of said amount shall be given to Jewish educational and charitable organizations.

In the selection of institutions which are to receive the principal hereunder, I further direct my Trustees to select only non-profit institutions, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes within the meaning of Section 812, Subsection (d) of the Internal Revenue Code."

One of the life beneficiaries, the decedent's sister, Rose Grody, died on February 27, 1958. The other life beneficiaries, decedent's sisters, namely, Sadie Kelson, is now eighty-one years of age and, Anna Shimberg, is now sixty-seven years of age. As set forth above, the entire residuary estate after the termination of the life estates are to be paid to various charitable and religious institutions in the City of Syracuse. Because of the pendency of this litigation, the trust has not been set up with the result that the rights of the income beneficiaries, decedent's aged sisters, and the residuary charitable remaindermen have been seriously prejudiced.

[fol. 88] 5. Although plaintiff and its counsel know of Mr. Heiman's death shortly after it happened on September 9, 1957 and although your deponent wrote to the plaintiff's counsel in connection therewith in January, 1958, no steps whatever were taken by plaintiff and its counsel in the Philadelphia court to substitute the executors as named defendants in the litigation in place of the decedent. No proof of claim in accordance with New York Surrogate's Court practice was ever filed by the plaintiff with the executors or with the Surrogate's Court of New York County. Not until twenty months after Mr. Heiman's death was the present application for a substitution of the executors of Marcus Heiman as parties defendant made.

Aaron Lipper

(Sworn to by Aaron Lipper, July 17, 1959.)

[fol. 89]

PORTION OF AFFIDAVIT OF HAROLD KOHN, SWORN TO JUNE 17, 1959, SUBMITTED IN OPPOSITION TO THE CROSS-MOTION OF THE EXECUTORS AND IN SUPPORT OF MOTIONS FOR SUBSTITUTION WITH EXHIBIT B-1 ANNEXED THERETO

Harold E. Kohn, being duly sworn according to law, deposes and says:

I am a member of the Philadelphia, Pennsylvania law firm of Dilworth, Paxon, Kalish, Kohn & Dilks, and am associated as of counsel for plaintiff, Goldlawr, Incorporated, in the above captioned action. I am the attorney for the plaintiff in connected actions pending in the United States District Court for the Eastern District of Pennsylvania, Civil Actions Numbers 21,506 and 22,029. This affidavit is submitted in opposition to the motions of United Booking Office, Inc., Select Operating Corporation and the Executors of the Estate of defendant, Marcus Heiman, Deceased, to dismiss this action.

1. Plaintiff instituted an antitrust suit against various persons and corporations including Marcus Heiman, the United Booking Office, Inc. and Select Operating Corporation, on October 17, 1956, in the Eastern District of Pennsylvania, which was given the file number of 21,506.

2. Plaintiff directed the United States Marshal to serve several defendants, including those mentioned above, at the headquarters of the Shubert organization in Philadelphia, Pa. under the belief that the persons in charge of that establishment were agents and employees of these defendants.

* * * * * * *

[fol. 90]

EXHIBIT B-1, ANNEXED TO AFFIDAVIT

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Mar 14 1957 AM

Civil Action File No. 25106

Alias Summons

GOLDLAWR, INCORPORATED

Plaintiff

v.

UNITED BOOKING OFFICE, INC.,

Defendant

MARCUS HEIMAN, Director)
Bus. 236 W. 44th St.) These are pencil notations
Home 24 W 55th St. N. Y.)

To the above named Defendant:

You are hereby summoned and required to serve upon Harold E. Kohn Esq., plaintiff's attorney, whose address is 2835 Fidelity Philadelphia Trust Bldg. Philadelphia 9 Pa. an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GILBERT W. LUDWIG
Clerk of Court.

Date: March 12, 1957

A. M. HEIDEMANN
Deputy Clerk.

[Seal of Court]

Note—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 91]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 26211, 26212

GOLDLAWR, INC., Plaintiff-Appellant,

against

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants-Appellees,

and

MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, Defendants.

APPENDIX OF DEFENDANTS-APPELLEES, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

[fol. 92]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 144-244

GOLDLAWR, INCORPORATED, Plaintiff,

against

MILTON SHUBERT, WILLIAM KLEIN, SYLVIA W. GOLDE, MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants.

NOTICE OF MOTION FOR AN ORDER DISMISSING ACTION

Please Take Notice that upon the annexed affidavit of Jacob J. Shubert, duly sworn to the 22 day of May, 1959, and the exhibits thereunto annexed, the undersigned, ap-

pearing specially and not generally, and solely for the purposes of this motion, will move this Court at the United States Court House, Room 506 thereof, at Foley Square in the Borough of Manhattan, City of New York, on the 16th day of June, 1959, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard (a) for an order dismissing the above-entitled action for the following reasons:

1. there has been no service of process on defendants Select Operating Corporation and United Booking Office, Inc. subsequent to the transfer of this action from the United States District Court for the Eastern District of Pennsylvania to this Court,

2. there was no valid service of process on defendants Select Operating Corporation and United Book- [fol. 93] ing Office, Inc. prior to the transfer of this action from the United States District Court of the Eastern District of Pennsylvania to this Court,

3. the United States District Court for the Eastern District of Pennsylvania had no jurisdiction over defendants Select Operating Corporation and United Booking Office, Inc. and therefore had no power to order the transfer of this action to this Court,

4. this Court cannot acquire jurisdiction of defendants Select Operating Corporation and United Booking Office, Inc. because the United States District Court for the Eastern District of Pennsylvania did not have jurisdiction of said defendants and the transfer was therefore improper, illegal and void,

5. prior to the transfer of this action to this Court, the defendants Select Operating Corporation and United Booking Office, Inc. filed motions to dismiss this action for lack of jurisdiction, which motions have not been adjudicated and have not been ruled upon by the United States District Court for the Eastern District of Pennsylvania,

or, in the alternative, (b) for an order dismissing this action on the grounds that an identical action is pending

in this Court, (c) for an order requiring the service of the summons and complaint, *de novo*, upon defendants Select Operating Corporation and United Booking Office, Inc., (d) for an order striking paragraphs 9 and 10 of the amended complaint upon the grounds that they are irrelevant to any injury allegedly incurred by the plaintiff and are scandalous, (e) for an order dismissing the amended complaint upon the grounds that the claims asserted therein are barred by the applicable statute of limitations; and [fol. 94] for such other and further relief as to this Court may seem just and proper in the premises.

Dated, New York, May 22, 1959.

Yours, &c.

Gerald Schoenfeld & Bernard B. Jacobs, 225 West 44th Street, New York 36, N. Y., appearing specially and not generally, and solely for the purposes of this motion on behalf of defendant Select Operating Corporation, By Gerald Schoenfeld (A member of the firm).

Lipper, Shinn & Keeley, 41 East 42nd Street, New York, N. Y. and Gerald Schoenfeld & Bernard B. Jacobs, 225 West 44th Street, New York 36, N. Y., appearing specially and not generally, and solely for the purposes of this motion on behalf of defendant United Booking Office, Inc., By Aaron Lipper (A member of the firm of Lipper, Shinn & Keeley), By Gerald Schoenfeld (A member of the firm of Gerald Schoenfeld & Bernard B. Jacobs).

To: Curtis, Mallet-Prevost, Colt & Mosle, Esqs., Attorneys for Plaintiff, 63 Wall Street, New York City, N. Y.

[fol. 95]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(Record, pages 123-132)

AFFIDAVIT OF JACOB J. SHUBERT, READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Jacob J. Shubert, being duly sworn deposes and says:

I am the President of Select Operating Corporation and a liquidator of United Booking Office, Inc., defendants in the above-entitled action and Civil Action No. 144-243. I submit this affidavit in support of the motion of said defendants, appearing specially and solely for the purposes of this motion, (a) for an order dismissing this action for the following reasons:

1. there has been no service of process on defendants Select Operating Corporation and United Booking Office, Inc. subsequent to the transfer of this action from the United States District Court for the Eastern District of Pennsylvania to this Court,

2. there was no valid service of process on defendants Select Operating Corporation and United Booking Office, Inc. prior to the transfer of this action from the United States District Court of the Eastern District of Pennsylvania to this Court,

3. the United States District Court for the Eastern District of Pennsylvania had no jurisdiction over defendants Select Operating Corporation and United [fol. 96] Booking Office, Inc. and therefore had no power to order the transfer of this action to this Court,

4. this Court cannot acquire jurisdiction of defendants Select Operating Corporation and the United Booking Office, Inc. because the United States District Court for the Eastern District of Pennsylvania did not have jurisdiction of said defendants and the transfer was therefore improper, illegal and void,

5. prior to the transfer of this action to this Court, the defendants Select Operating Corporation and United Booking Office, Inc. filed motions to dismiss this action for lack of jurisdiction, which motions have not been adjudicated and have not been ruled upon by the United States District Court for the Eastern District of Pennsylvania,

or, in the alternative, (b) for an order dismissing this action on the grounds that an identical action is pending in this Court, (c) for an order requiring the service of the summons and complaint, *de novo*, upon defendants Select Operating Corporation and United Booking Office, Inc., (d) for an order striking paragraphs 9 and 10 of the amended complaint upon the grounds that they are irrelevant to any injury allegedly incurred by the plaintiff and are scandalous, (e) for an order dismissing the amended complaint upon the grounds that the claims asserted therein are barred by the applicable statute of limitations.

This, and Civil Action No. 144-243, are two anti-trust actions originally instituted in the United States District Court for the Eastern District of Pennsylvania.

The amended complaints in each action in the Eastern District are substantially similar (and are identical in the pending actions) and in substance allege that the defendants therein have brought pressure to bear on producers [fol. 97] to prevent them from presenting attractions in plaintiff's theatre in Philadelphia.

In one of said actions the complaint was filed in Philadelphia on October 17, 1956, and in the other of said actions the complaint was filed on February 18, 1957. The later action filed by plaintiff differed from the earlier one in that it added additional parties defendant, sought to enlarge the scope of the period covered by the complaint, and sought to come within the tolling provisions of Section 5(b) of the Clayton Act (38 Stat. 731, 15 U. S. C. A. Sec. 16). The defendants Select Operating Corporation and United Booking Office were named as party defendants in each of said actions.

Civil Action 21506

(Pending in the Eastern District of Pennsylvania)

On February 19, 1957, the plaintiff procured an alias summons which was on March 8, 1957, returned by the United States Marshal for the Southern District of New York as having been served on February 28, 1957, on Select Operating Corporation in New York, and "Not found" as to United Booking Office, Inc. (hereinafter sometimes referred to as "U.B.O."). On March 12th a further alias summons issued as to United Booking Office. This was returned on March 26th by the United States Marshal as having been served on March 19, 1957, on U.B.O. in New York. On March 20th, Select Operating Corporation filed a motion to quash the aforesaid service of the alias summons in New York, and to dismiss for lack of jurisdiction and improper venue on the grounds that it was a New York corporation and was not an inhabitant of, and did not transact business in, the Eastern District of Pennsylvania. On April 1st, United Booking Office, Inc., filed a similar motion upon the same grounds with respect to the service upon it.

[fol. 98] Civil Action 22092

(Pending in the Eastern District of Pennsylvania)

An alias summons issued March 12, 1957, as to U.B.O. On March 26th, this writ was returned by the United States Marshal for the Southern District of New York as having been served on March 19, 1957 on U.B.O. On April 1, 1957, U.B.O. filed a motion to quash the aforesaid service of the alias summons and also filed motions to dismiss for lack of jurisdiction and improper venue.

On March 11, 1957, the United States Marshal's return was filed indicating service on February 28, 1957, upon defendant Select Operating Corporation in New York. On March 20, 1957, Select Operating Corporation filed a motion to dismiss for lack of jurisdiction and improper venue.

The grounds of the motions made by Select Operating Corporation and United Booking Office, Inc. were the same as in Civil Action 21506, to wit, that both Select Operating Corporation and U.B.O. were not inhabitants of, and did

not transact business in, the Eastern District of Pennsylvania.

These motions subsequently were argued and on December 22, 1958, an opinion was rendered by Judge William Kraft, Jr., which opinion states on page 17 that the motions of Select Operating Corporation and U.B.O. to dismiss for improper venue will be granted.[1] A copy of said opinion is annexed hereto and made part hereof as Exhibit A. The motions to dismiss for lack of jurisdiction are not mentioned or disposed of in the opinion of the Court insofar as it relates to Select Operating Corporation and U.B.O.

[fol. 99] Subsequent to the rendering of the opinion of December 22, 1958, and prior to the entry of an order thereon, the plaintiff moved to transfer each of these actions to the United States District Court for the Southern District of New York and set forth as one of the reasons for making such motion the following:

> "1. This Court (United States District Court for the Eastern District of Pennsylvania), in its opinion filed December 22, 1958, found that venue was improperly laid in this District as to the above named defendants." (parenthetical matter added).

A copy of said motion is annexed hereto and made part hereof as Exhibit "B".

The plaintiff furthermore urged as an additional reason for the transfer that the United States District Court for the Eastern District of Pennsylvania found "there was no jurisdiction here over the defendants" (page 2 of plaintiff's memorandum in connection with transfer) and sought to transfer both actions to this Court pursuant to the provisions of 28 U. S. C. A., Sec. 1406(a), which provides as follows:

> "The district Court of a District in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, trans-

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[1] On page 12 of the opinion it is stated "The evidence fails to persuade us that these corporations were themselves doing business here." The opinion states, *infra*, that defendants were not doing business through agents (p. 15).

fer such case to any district or division in which it could have been brought."

On March 2, 1959, orders were entered in the United States District Court for the Eastern District of Pennsylvania in each action which provided in paragraph 4 thereof "decision is reserved upon the motions of United Booking Office, Inc. and Select Operating Corporation to dismiss for improper venue pending determination of the plaintiff's [fol. 100] motion, since filed, to transfer under 28 U. S. C. A., Section 1406(a).

On March 3, 1959, further orders were entered in each action *denying* the motions of defendants Select Operating Corporation and U.B.O. to dismiss for improper venue (contrary to the opinion of the Court) and granting the motion of the plaintiff to transfer to the Southern District of New York pursuant to 28 U. S. C. A., Sec. 1406(a), with respect to defendants Select Operating Corporation and U.B.O. Subsequently, copies selected by plaintiff of filed papers in both actions were transferred from the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the Southern District of New York and the actions were so transferred as to all defendants captioned above.

Plaintiff's counsel in the actions still pending in the United States District Court for the Eastern District of Pennsylvania (as against those defendants as to whom no transfer was ordered) has since the date of transfer directed correspondence to present counsel for defendants Select Operating Corporation and U.B.O. requesting them to advise plaintiff's counsel if they are the attorneys for Select Operating Corporation and U.B.O. in order that there may be sent to them copies of amended pleadings in the present actions. This tactic is at variance with the statement previously made by plaintiff's counsel in its letter of March 2, 1959, directed to Judge Kraft in support of its motion to transfer, a copy of which is annexed hereto and made part hereof as Exhibit "C", in which it is stated:

"The problem of service in New York likewise is of no moment to the issue here. Service, of course, will

have to be made in New York on the defendants as against whom the action is transferred. Problems incident to such service and to the substitution of personal representatives will be decided in the Southern District, if and when they arise."

[fol. 101] Upon receipt of the communications from plaintiff's counsel, defendants' counsel advised them that upon the service of pleadings or other papers upon defendants Select Operating Corporation and U.B.O., appropriate proceedings would be undertaken on behalf of such defendants in the event these defendants retained their present attorneys. Finally, there was mailed by plaintiff's Philadelphia counsel from Philadelphia, Pennsylvania, on May 5, 1959, to defendants Select Operating Corporation and U.B.O. mimeographed copies of amended complaints in each of the two actions.

The receipt of such amended pleadings prompted the defendants Select Operating Corporation and U.B.O. to make the instant motions to dismiss this action and Civil Action No. 144-243.

The transfer to this District of Select Operating Corporation and U.B.O. pursuant to 28 U. S. C. A., Sec. 1406(a), is contended by defendants to be improper for reasons discussed in the memorandum of law to be submitted upon the argument of this motion. The circumstances which induced the transfer of this action to the Southern District of New York, as set forth in the record, are that venue was improperly laid in the Eastern District of Pennsylvania. Notwithstanding defendants' motions to dismiss for lack of jurisdiction, the District Court for the Eastern District of Pennsylvania ordered the transfer of this action without any determination of, or ruling on, said motions. Upon this state of the record and the further statement of plaintiff's counsel that service will have to be made upon defendants Select Operating Corporation and U.B.O. in the Southern District of New York and for the preservation of defendants' rights under the applicable statute of limitations, this action should be dismissed and the purported service of the amended complaint should be quashed.

[fol. 102] *Motion to dismiss on the grounds that an identical action is pending in this Court*

The amended complaint served by mail upon defendants Select Operating Corporation and U.B.O. is identical with the amended complaint similarly served in Civil Action No. 144-243. A copy of each of said amended complaints is annexed hereto and made part hereof as Exhibit "D" and "E", respectively.

Plaintiff instituted a second action in the Eastern District of Pennsylvania in which it joined additional parties defendant and sought to enlarge the period of time covered by the complaint in the first action. Whether this second action was instituted within the time limitations contained in Sec. 5(b) of the Clayton Act (38 Stat. 731, 15 U. S. C. A. Sec. 16) is a matter at issue with respect to the additional defendants named by plaintiff in the second action instituted in the Eastern District. As the defendants Select Operating Corporation and U.B.O. were originally parties defendant in both actions instituted in the Eastern District, there is no necessity for there to be two actions pending against it in this Court and one of the pending actions should be dismissed.

Motion to require the service of the summons and complaint, de novo, upon the defendants Select Operating Corporation and U.B.O.

The effect of the transfer of this action upon the statute of limitations is dependent upon whether a valid and proper service was made upon defendants Select Operating Corporation and U.B.O. in the Eastern District of Pennsylvania. If such a service was not made (and defendants contend that it was not), it is defendants' position that subsequent to the transfer of this action to this Court the plaintiff is required to serve, *de novo*, the summons and complaint upon defendants Select Operating Corporation [fol. 103] and U.B.O. Defendants' memorandum of law will demonstrate that the purported service made upon defendants Select Operating Corporation and U.B.O., who were found not to be inhabitants of, and not to transact business in, the Eastern District of Pennsylvania, did not

operate to toll the statute of limitations and that a new service is required under the circumstances of the instant case in order to confer the jurisdiction upon this Court and prevent the further running of the statute of limitations.

Motion to strike paragraphs 9 and 10 of the amended complaint

The substance of paragraph 9 of the amended complaint is that the defendants charge higher box office prices than they ought to, and the substance of paragraph 10 of the amended complaint is that the defendants conspired with ticket brokers and ticket scalpers to restrain the sale of tickets at box office prices in order to compel prospective purchasers to buy from the brokers. Plaintiff claims to be damaged by these activities.

Substantially similar allegations were contained in the original complaints filed in the actions instituted in the Eastern District of Pennsylvania and such allegations were ordered stricken (see pages 25-28 Opinion of Kraft, J., dated December 22, 1958 and paragraph 11 of the order entered thereon dated March 2, 1959, a copy of which order is annexed hereto and made part hereof as Exhibit "F").

Plaintiff is now seeking by way of amendment to re-allege these allegations in the instant action and, as will be pointed out in defendants' memorandum of law, these allegations should be stricken upon the grounds that they are irrelevant to any injury sustained by the plaintiff and are scandalous.

[fol. 104] *The defense of the statute of limitations*

This defense cannot be properly applied in this case until after the Court has determined when, if ever, the action was commenced. It is the position of Select Operating Corporation and U.B.O. that the action has not yet been properly commenced against them in either jurisdiction.

Jacob J. Shubert

(Sworn to May 22, 1959.)

[fol. 105]

EXHIBIT C, ANNEXED TO AFFIDAVIT OF JACOB J. SHUBERT

March 2, 1959.

Honorable C. William Kraft, Jr.,
2112 United States Court House,
Philadelphia 7, Pennsylvania.

Re: Goldlawr v. Shubert, Civil Actions Nos. 21,506 and 22,092

Dear Judge Kraft:

This is in reply to the supplemental brief filed in the above matters by Mr. Phillips under date of February 27th.

1. Defendants can hardly be serious in urging as a reason against transferring the case as to certain defendants to the Southern District of New York that there is a problem as to what papers are to be sent to the Clerk's office in New York. As a matter of fact, there really is no problem even on that score. The Clerk merely sends photostatic copies of the pleadings, certified to be correct.

2. The problem of service in New York likewise is of no moment to the issue here. Service, of course, will have to be made in New York on the defendants as against whom the action is transferred. Problems incident to such service and to the substitution of personal representatives will be decided in the Southern District, if and when they arise.

3. The reason for the second suit now pending clearly appears from the transcript of the proceedings before Judge Van Dusen on February 18, 1957, at page 7 of which Judge Van Dusen suggested that in order to protect our rights, in view of defendants' refusal to stipulate as to preserving our rights as of the date of filing the motion to amend the complaint, which motion has since been granted, it would be advisable to file a new complaint that day. This was done.

Very truly yours,

/s/ HAROLD E. KOHN.

cc: C. Russell Phillips, Esq.

[fol. 106]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL AFFIDAVIT OF JACOB J. SHUBERT, READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Jacob J. Shubert, being duly sworn, deposes and says:

I submit this affidavit to supplement the affidavit heretofore sworn to by me on May 22, 1959.

Civil Action No. 144-244 was Civil Action No. 21506 in the United States District Court for the Eastern District of Pennsylvania and Civil Action No. 144-243 was Civil Action No. 22092 in the United States District Court for the Eastern District of Pennsylvania.

In Civil Action No. 21506 instituted in the Eastern District of Pennsylvania a purported service of process was made by the United States Marshal on November 7, 1956, upon Select Operating Corporation and U. B. O. by taking copies of the summons and complaint and leaving them on a desk at 209 Quince Street, Philadelphia, Pa. Returns of service on each of said defendants read substantially as follows:

"I hereby certify and return, that on the 7th day of November, 1956, I received this summons and served it together with the complaint herein as follows:

[fol. 107] 'On November 7, 1956, upon (naming the defendant) at 209 Quince Street, Philadelphia, Penna., by leaving copies thereof on desk of woman in charge who refused to give her name or title and making contents of said service known to her. Service made in this, by advice of plaintiff's attorney.'"

On November 26, 1956, defendants Select Operating Corporation and U. B. O. filed motions to dismiss the action for lack of jurisdiction on the grounds that they are cor-

porations and that the summons and complaint were not delivered to an officer, managing or general agent, or to any one agent authorized by law to receive service, as required by Rule 4(d)(3) of the Federal Rules of Civil Procedure. On the same date the defendants filed motions to dismiss for improper venue on the grounds that they are corporations, and are not inhabitants, and are not found and do not transact business in, the Eastern District of Pennsylvania as required by Section 12 of the Clayton Act, 28 U. S. C. A. Section 22.

The subsequent motions to dismiss on the same grounds filed in Civil Action No. 21506 were made by reason of the fact that the plaintiff had filed an amended complaint.

The disposition of the defendants' motions by Judge Kraft's opinion and orders is referred to at length in the main affidavit heretofore sworn to by me and in the memorandum of law to be submitted in support of the motions made herein by defendants Select Operating Corporation and U. B. O.

Jacob J. Shubert

(Sworn to June 10, 1959.)

[fol. 108]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER DISMISSING ACTION—September 1, 1959

And Now, this 1st day of September, 1959, upon consideration of the motions of defendants, Select Operating Corporation and United Booking Office, Inc., to dismiss for lack of jurisdiction, upon the plaintiff's motion to substitute the executors of the Estate of Marcus Heiman and the cross motion to dismiss as to defendant Marcus Heiman for lack of jurisdiction, and upon the motions of defendants William Klein, Milton Shubert and Sylvia W. Golde to dismiss for pendency of another action, and upon the record and arguments thereon, it is hereby

Ordered and Decreed

1. That the motions of the defendants Select Operating Corporation and United Booking Office, Inc. in each of the above entitled actions to dismiss the complaints as against them for lack of jurisdiction, over the persons of such defendants, be, and the same hereby are granted.

2. That the motion of the executors of the Estate of Marcus Heiman, deceased, to dismiss as to Marcus Heiman for lack of jurisdiction, over the persons of such defendant, be, and the same hereby is granted; that the motion of plaintiff to substitute the executors of the estate of Marcus Heiman, deceased, as party defendant, be, and the same is denied.

[fol. 109] 3. This Court finds that with respect to the order dismissing the action as to Select Operating Corporation, United Booking Office, Inc. and Marcus Heiman, there is no just reason for delay and this Court directs the entry of judgment in favor of said Select Operating Corporation, United Booking Office, Inc. and Marcus Heiman.

4. That Civil Action Nos. 144-243 and 144-244 be consolidated for all purposes, that all pleadings hereafter filed shall contain a caption listing both civil action numbers but shall be docketed in Civil Action No. 144-243 with the same force and effect as if they were docketed in both actions.

Palmieri, J., U. S. D. J.

[fol. 110]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1959.

(Motions argued December 7, 1959

Decided December 29, 1959.)

Docket Nos. 25964, 25965

GOLDLAWR, INC., Plaintiff-Appellant,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants-Appellees,

and

MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, Defendants.

OPINION—December 21, 1959

Before: Lumbard, Chief Judge, Swan and Friendly, Circuit Judges.

Motions by defendants-appellees to dismiss, for want of appellate jurisdiction, appeals from a judgment of the District Court for the Southern District of New York, Edmund L. Palmieri, Judge, which dismissed the action as [fol. 111] to defendants-appellees for want of personal jurisdiction. Motions granted.

Gerald Schoenfeld & Bernard B. Jacobs, New York, New York, for defendant-appellee Select Operating Corporation.

Gerald Schoenfeld & Bernard B. Jacobs, and Lipper, Shinn & Keeley, New York, New York, for defendant-appellee, United Booking Office, Inc. (C. Russell

Phillips and Hugh G. Moulton of Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., of counsel for above two defendants-appellees).

Lipper, Shinn & Keeley, New York, New York, for defendant-appellee Morgan Guaranty Trust Co. and Asher Levy, Executors of the Estate of Marcus Heiman, deceased.

Curtis, Mallet-Prevost, Colt & Mosle (Harold E. Kohn and Dolores Korman of Dilworth, Paxson, Kalish, Kohn & Dilks, Philadelphia, Pa., of counsel), for plaintiff-appellant.

Per Curiam:

The amended complaint against six defendants alleges a conspiracy to violate the anti-trust laws and damage caused thereby to the plaintiff in the operation of the Erlanger Theatre in Philadelphia. It prays for a judgment against all the defendants in the amount of $1,050,000 to be trebled in accordance with the Clayton Act. 15 U. S. C. A. § 15 together with costs and an attorney's fee, and for an injunction. As against three of the defendants, the appellees, the action was dismissed for lack of personal jurisdiction. [fol. 112] The action remained pending against the others. The judgment of dismissal contained a direction, such as is provided for by amended Rule 54(b) of the Federal Rules of Civil Procedure, that there was no just reason for delay and that judgment be entered in favor of the three defendants. Thereupon plaintiff filed timely notice of appeal. Amended Rule 54(b) expressly deals with multiple claims; consequently the weight of authority has held that in situations involving multiple parties but only a single claim, a 54(b) certificate is ineffective to make appealable a judgment dismissing the action against some parties but leaving it pending against others.[1] Some decisions in the Sec-

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[1] *Steiner* v. *20th Century Fox Film Corp.*, 220 F. 2d 105 (9th Cir. 1955); *Nettles* v. *General Accident Fire and Life Assurance Corp.*, 234 F. 2d 243 (5th Cir. 1956); *Brandt* v. *Renfield Importers, Ltd.*, 269 F. 2d 14 (8th Cir. 1959). The Seventh Circuit indicated

ond Circuit appear to have taken a contrary view. *Lopinsky* v. *Hertz Drive-Ur-Self Systems, Inc.*, 194 F. 2d 422 (1951), *Colonial Airlines* v. *Janas*, 202 F. 2d 914 (1953), *Rao* v. *Port of New York Authority*, 222 F. 2d 362 (1955), and *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F. 2d 213 (1955). On further consideration we have concluded that the Fifth, the Eighth, the Ninth and, as we read its opinions, the Seventh Circuit have been correct in thinking that amended Rule 54(b) does not allow a finding of finality in the case here presented where a single claim against multiple parties is dismissed as against some but not all. In consequence we must dismiss the appeals for want of appellate jurisdiction.

Appeals dismissed.

[fol. 113] SWAN, Circuit Judge (concurring):

I agree, but wish to add that in my opinion dismissal of the appeal accords with our recent decisions. *Scott Beverage Corporation* v. *Canada Dry Ginger Ale, Inc.*, 243 F. 2d 795, 796; *Schwartz* v. *Eaton*, 264 F. 2d 195, 197; *Seaboard Machinery Corp.* v. *Seaboard Machinery Corp.*, 267 F. 2d 178, 179. See also *Gauvreau* v. *United States Pictures*, 267 F. 2d 861; *John and Sal's Automotive Service, Inc.* v. *Jones Beach State Parkway Authority*, 267 F. 2d 862.

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its agreement with this view in *Hardy* v. *Bankers Life & Casualty Co.*, 222 F. 2d 827 (7th Cir. 1955), although in that case no Rule 54(b) certificate had in fact been made; we do not read *Morgan Drive Away, Inc.* v. *International Brotherhood of Teamsters*, 268 F. 2d 871 (7th Cir. 1959), as taking a different view. See also 6 Moore, Federal Practice § 54.34[2].

[fol. 114]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1959

(Petition for Rehearing filed January 11, 1960
Decided January 18, 1960)

Docket Nos. 25964, 25965

GOLDLAWR, INC., Plaintiff-Appellant,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants-Appellees,

and

MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, Defendants.

OPINION—January 18, 1960

Before: Lumbard, Chief Judge, Swan and Friendly, Circuit Judges.

Gerald Schoenfeld & Bernard B. Jacobs, New York, New York, for defendant-appellee Select Operating Corporation.

[fol. 115] Gerald Schoenfeld & Bernard B. Jacobs, and Lipper, Shinn & Keeley, New York, New York, for defendant-appellee, United Booking Office, Inc. (C. Russell Phillips and Hugh G. Moulton of Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., of counsel for above two defendants-appellees).

Lipper, Shinn & Keeley, New York, New York, for defendant Appellee Morgan Guaranty Trust Co. and Asher Levy, Executors of the Estate of Marcus Heiman, deceased.

Curtis, Mallet-Prevost, Colt & Mosle (Harold E. Kohn and Dolores Korman of Dilworth, Paxson, Kalish, Kohn & Dilks, Philadelphia, Pa., of counsel), for plaintiff-appellant.

Per Curiam:

Appellant has applied for rehearing of our decision of December 29, 1959, that amended Rule 54(b) of Federal Civil Procedure does not allow such a finding of finality as is required for an appeal under 28 U. S. C. § 1291 in a case "where a single claim against multiple parties is dismissed as against some but not all." In the alternative appellant seeks an amendment of our order dismissing the appeal so as to permit appellant to proceed under the Interlocutory Appeals Act, 28 U. S. C. § 1292(b), alleging that it would have sought to do this in the first instance if the rule stated in our recent opinion "had been previously announced."

The petition for rehearing is denied. However, since here "the question of jurisdiction was not obviously settled [fol. 116] by prior decisions," the appropriate course is, in dismissing the appeal under 28 U. S. C. § 1291, also to vacate Judge Palmieri's judgment of September 1, 1959, for the sole purpose of permitting him to "enter a fresh decree" in which he may include the statement described in 28 U. S. C. § 1292(b) if in his full discretion he determines that such a statement is here justified. See *Phillips* v. *United States*, 312 U. S. 246, 254; *Rorick* v. *Commissioners*, 307 U. S. 208, 213; *In re Cook's Motors*, 142 F. 2d 369, 370 (1st Cir.).

It is so ordered.

[fol. 117]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 27, 28—October Term, 1960.

(Argued October 3, 1960)

Docket Nos. 26211, 26212

GOLDLAWR, INC., Plaintiff-Appellant,

—against—

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants-Appellees,

and

MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, Defendants.

OPINION—February 21, 1961

Before: Hincks, Waterman and Moore, Circuit Judges.

Appeal under 28 U. S. C. §1292(b) from an order of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, dismissing an anti-trust action against appellees because of improper transfer under 28 U. S. C. §1406(a) and denying plaintiff-appellant's motion to substitute the executors of a defendant who had died never having been served.

Affirmed.

[fol. 118]

Harold E. Kohn, Philadelphia, Pa. (Curtis, Mallet-Prevost, Colt & Mosle, New York City, Dolores Korman and Dilworth, Paxon, Kalish, Kohn & Dilks, Philadelphia, Pa., on the brief), for plaintiff-appellant.

Aaron Lipper, New York City (Lipper, Shinn & Keeley, and Richard B. Dannenberg, New York City, on the brief), for Morgan Guaranty Trust Company and Asher Levy, Executors of the Estate of Marcus Heiman, Deceased.

C. Russell Phillips, Philadelphia, Pa. (Gerald Schoenfeld, Bernard B. Jacobs, Lipper, Shinn & Keeley, New York City, Hugh G. Moulton, and Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., on the brief), for defendants-appellees, Select Operating Corporation and United Booking Office, Inc.

Moore, Circuit Judge:

Pursuant to leave granted by this Court (March 7, 1960; 28 U. S. C. §1292(b)), plaintiff, Goldlawr, Incorporated (Goldlawr), appeals from an order (January 27, 1960) dismissing the complaints in two actions filed jointly in the Southern District of New York against Select Operating Corporation (Select) and United Booking Office, Inc. (UBO) "for lack of jurisdiction over the persons of such defendants." Goldlawr also appeals from the order as to the defendant, Marcus Heiman, deceased, which dismissed for lack of personal jurisdiction and denied its motion to substitute the Executors of the Estate of Marcus Heiman as defendants.

[fol. 119] By orders entered in the United States District Court for the Eastern District of Pennsylvania (the Pennsylvania court), these two cases against Select, UBO and certain individuals originally filed in Pennsylvania[1] were

[1] Suit originally was instituted on October 17, 1956, in Philadelphia. Alias summonses were served on Select and UBO in New York City. A second suit was filed in Philadelphia on February 18, 1957. The order transferring both cases to New York was dated March 3, 1959. Amended complaints were thereafter served. The amended complaint in New York omitted the defendants as to whom venue had been found to be proper in Pennsylvania; the amended complaint in Pennsylvania omitted those defendants as to whom the actions had been transferred to New York.

The defendant Marcus Heiman died on September 9, 1957, after the Pennsylvania motion to dismiss had been argued but before the order of transfer had been entered.

transferred "in the interest of justice" to the Southern District of New York (the New York court) "conformably to 28 U. S. C. A. §1406(a)." [2] Thereafter, Select, UBO and four individual defendants, appearing specially, moved to dismiss for five reasons: (1) that there had been no service of process on Select or UBO subsequent to the transfer; (2) that there had been no valid service of process on Select or UBO prior to transfer; (3) that without jurisdiction over Select or UBO the Pennsylvania court had no power to order the transfer; (4) that the New York court did not acquire jurisdiction because the transfer was illegal; and (5) that the Pennsylvania court had failed to rule on the motions there made to dismiss for lack of jurisdiction.

The court below held that it "lacks personal jurisdiction over the defendants since effective service of process has never been accomplished." However, it recognized that if [fol. 120] transfer were authorized, plaintiff might make proper service in New York, hence determination of the validity of the transfer was necessary on the theory that "if the transfer to this District were authorized, plaintiff might still be in a position to avoid dismissal by making proper service upon defendants without further delay." (175 F. Supp. 793, 796.) It is appropriate therefore for the transferee court or the Court of Appeals of the transferee district to inquire into the propriety of the transfer. See *Hoffman* v. *Blaski, et al.*, 363 U. S. 335 (1960), by implication; *Arrowhead Co., Inc.* v. *The Aimee Lykes*, 2 Cir., 1951, 193 F. 2d 83.

Goldlawr, operating a theatre in Philadelphia, sued Select, UBO, the individual defendants and others not involved in this appeal under Sections 1[3] and 2[4] of the Sher-

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[2] §1406. Cure or Waiver of Defects.

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." June 25, 1948, c. 646, §1, 62 Stat. 937; May 24, 1949, c. 139, §81, 63 Stat. 101.

[3] 15 U. S. C. 1, July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

[4] 15 U. S. C. 2, July 2, 1890, c. 647, §2, 26 Stat. 209.

man Act and Sections 4[5] and 16[6] of the Clayton Act, alleging a conspiracy to restrain and monopolize interstate commerce, demanding treble damages and seeking an injunction against the continuance of defendants' allegedly unlawful acts.

Section 12 of the Clayton Act,[7] 15 U. S. C. 22, specifies where suit against a corporation under the antitrust laws may be brought, namely, in a district where it is an inhabitant and also where "it may be found or transacts business." Conversely, it should follow that if a corporation is not an [fol. 121] inhabitant of, is not found in, and does not transact business in, the district, suit may not be so brought. By statutory grant if suit is brought as prescribed in this section "all process in such cases may be served in the district of which it [the corporation] is an inhabitant, or wherever it may be found." Thus, "in such cases," Congress has seen fit to enlarge the limits of the otherwise restricted territorial areas of process. In other words, the extraterritorial service privilege is given only when the other requirements are satisfied.

Upon a motion to dismiss in the Pennsylvania Court, the court held that Select and UBO were not inhabitants of the district or found or transacting business there. However, instead of ruling that therefore the suit could not be brought in the Pennsylvania district, the court, relying on Section 1406(a), 28 U. S. C., treating the motions as "Motions to Dismiss for Improper Venue," ordered the suits transferred to New York (*Goldlawr, Incorporated* v. *Shubert*, D. C. E. D. Pa., 1958, 169 F. Supp. 677).

The substance of the decision appealed from is that "the privilege of extraterritorial service is expressly confined to actions brought in a district in which the corporation is an

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[5] 15 U. S. C. 15, Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

[6] 15 U. S. C. 26, Oct. 15, 1914, c. 323, §16, 38 Stat. 737.

[7] "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." Oct. 15, 1914, c. 323, §12, 38 Stat. 736.

inhabitant, found, or transacting business"; that these conditions have not been met and therefore personal jurisdiction was not achieved by service of the alias summonses in New York; that Section 1406(a) which "speaks to defective venue only, cannot be made to do service when there is also a jurisdictional defect"; that proper jurisdiction is a basic requirement; and that a Congressional intent to cure jurisdictional defects cannot be found in a mere venue transfer provision. (175 F. Supp. 793.) Goldlawr has not here, either in the brief or on oral argument, challenged the determination that the transferor court did not have personal jurisdiction over appellees.

[fol. 122] The motion to substitute the heirs of Marcus Heiman was denied and the cross-motion to dismiss for lack of jurisdiction was granted because no personal jurisdiction had ever been obtained as to Heiman before or after the transfer order and because of doubt that Rule 25(a)(1), Fed. R. Civ. P. authorized executor substitution under such circumstances.

It has long been established that federal courts should not assume jurisdiction to decide cases merely because it would be constitutional for Congress to have given them the jurisdiction they seek to exercise. See generally Hart and Wechsler, *The Federal Courts and the Federal System*, 1953, pp. 288-340. "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon* v. *Sill*, 49 U. S. 440, 449 (1850). Jurisdiction, over the subject matter and over the person, has been a basic concept of our jurisprudence. Although a defendant may have full knowledge that an action has been commenced against him, a court, nevertheless, lacks jurisdiction to enter a judgment against him unless jurisdiction over his person has been obtained in strict compliance with a statute designating the method of obtaining such jurisdiction. *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928). The balancing of competing interests which is involved in determining jurisdictional issues has been repeatedly emphasized by the Supreme Court. *Pennoyer* v. *Neff*, 95 U. S. 714 (1877); *McDonald* v. *Mabee*, 243 U. S. 90 (1917); *Hess* v. *Pawlowski*, 274 U. S. 352 (1927); *Milliken* v. *Meyer*, 311 U. S. 457 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950).

Because the concept of the power of a court to act and affect the rights of a party is so fundamental, jurisdiction of courts to act should be based on clear legislative pronouncements. And just as their jurisdictional authority is given to the courts by the legislature, so also must legislative limi- [fol. 123] tations be expanded or removed by the same process. Section 1406(a) provides for the transfer of cases when venue is improper. It does not mention jurisdictional defects. Whatever be the desirability of a rule that a district court may transfer a case when venue is mislaid and jurisdiction over the person of the defendant is lacking, it is an unwarranted exercise of judicial interpretation to find that a statute, expressly providing for transfer to cure a venue defect, impliedly provides for a transfer to cure a more basic jurisdictional defect. The lesser does not by implication include the greater.

The legislative history of Section 1406(a) indicates that the draftsmen never disclosed any belief that in promulgating a provision for transfer in the event of improper venue, they also intended their creation to make transfer possible where jurisdiction is lacking. Section 1406(a) "radically altered prior law" (Moore's Commentary on the Judicial Code, p. 196). Prior to its enactment when venue was found defective, dismissal of the action was mandatory. *Camp* v. *Gress*, 250 U. S. 308, 316 (1919); *Schoen* v. *Mountain Producers Corp.*, 3 Cir., 1948, 170 F. 2d 707, 713. Considering the revolutionary character of the change, courts ought to demand a plain expression of the innovation and ought not extend it any further than the statutory language clearly warrants. See *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627 (1925); *Foster Milburn Co.* v. *Knight*, 2 Cir., 1950, 181 F. 2d 949, 952. There is no indication, however, in the Congressional history behind the 1948 enactment that would suggest that the section is addressed to anything more than a venue defect.

Section 1406(a) as originally enacted required transfer when venue was improperly laid, but because it was recognized that litigants might abuse the section by purposely bringing an action in a district where venue was improper, [fol. 124] in 1949 Congress amended the section to make transfer discretionary "in the interest of justice." The

Senate Report explaining the amendment impliedly evidences a Congressional intent that a prerequisite to the operation of the section is that the court have personal jurisdiction over the parties. The report states:

> "It is thought that the provision [the 1948 version of §1406(a)] may be subject to abuse in that plaintiff might deliberately bring a suit in a wrong division or district *where he could get service on the defendant*, and when the question of venue is raised the court is required to transfer the case to the court where it could have been brought. However, in the meantime, *service has been perfected on a defendant in the wrong venue*, and it will carry over into the new (and proper) venue." [Emphasis added.] Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949).

Although this statement does not explicitly address itself to a suit in the wrong district where no service can be obtained, implicitly it appears to express a Congressional recognition that section 1406(a) is to be operative only after valid "service on the defendant" giving the court personal jurisdiction.

Goldlawr takes the position that the section does not specifically require personal jurisdiction before transfer and argues that judicial ingenuity should be used to liberalize the statute by decisions that jurisdiction is not required. While it is true that Congress could have provided for the transfer in the absence of personal jurisdiction over defendants, it has not done so.

The scope of judicial authority should not be lightly extended in the absence of a clear statutory basis. While not relevant to the present appeal in its actual holding, [fol. 125] *Miner* v. *Atlass*, 363 U. S. 641 (1960), is nevertheless a warning that federal courts should proceed with caution when considering the merit of implying basic procedural innovations. Although a liberal transfer statute might be wise, such a change is more properly a subject for legislative action after "mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such

consideration [legislative] affords." *Miner* v. *Atlass*, *supra*, p. 650.

Chapter 87, Title 28, United States Code, enacted into positive law, by its organization, is persuasive of the conclusion that Congress did not intend section 1406(a) to be more than a statute making it possible for the court to cure venue, not jurisdictional, defects. Chapter 87 is titled "District Court; Venue" and includes sections 1391 to 1406. Most of the sections dictate venue requirements and specify that a failure to comply with them will be deemed a defect which impedes the cause from going to final adjudication. However, a venue defect can be waived and section 1406 is entitled "Cure or Waiver of Defects." The placement of the section at the end of Chapter 87 suggests that the defects it is to be used to cure are defects caused by failure to comply with the basic sections of the chapter. These are venue defects and not jurisdictional ones.

Furthermore, Goldlawr concedes that under section 1404 (a),* a legislative sibling to section 1406, "there must be jurisdiction and venue in the transferring district as well as in the district to which the case is transferred." But if jurisdiction is necessary under section 1404(a) which [fol. 126] permits transfer for convenience of parties and witnesses so also should this requirement be met when the transfer is made for improper venue. Although the reason for the transfer is different in the two sections, they are under the same general venue heading and there is no indication whatsoever that Congress thought that it was dealing with an entirely different subject in section 1406(a). It was merely providing for a way in which to cure a venue defect.

How has it come to pass that Section 1406(a), clear enough in its language and intent, has been now held out as authorizing transfer without personal jurisdiction?

The cases directing transfer under section 1406(a) despite a lack of personal jurisdiction over the defendant,

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* §1404 Change of venue.

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." June 25, 1948, c. 646, 62 Stat. 937.

indicate that the view that the section authorizes transfers even in the absence of personal jurisdiction over the defendant had its genesis in a misconception of the holding of this Court in *Schiller* v. *Mit-Clip Co.*, 2 Cir., 1950, 180 F. 2d 654. For example, in *Petroleum Financial Corp.* v. *Stone*, S. D. N. Y., 1953, 116 F. Supp. 426, the court expressed serious doubts as to the propriety of transfer under Section 1406(a) when the transferor court did not have personal jurisdiction over the defendant, but in supposed compliance with *Schiller* granted the transfer. *Petroleum Financial Corp.* v. *Stone*, *supra*, has been criticized for misconstruing *Schiller*. (38 Minn. L. Rev. 874 (1954).) The unwarranted construction of the statute based on *Schiller* has gained currency by virtue of repetition. Later cases supposedly following *Schiller* include *United States* v. *Welch*, S. D. N. Y., 1957, 151 F. Supp. 899 (citing only *Schiller*); *Orzulak* v. *Federal Commerce and Navigation Co.*, E. D. Pa., 1958, 168 F. Supp. 15 (resting in part on *Petroleum Financial Corp.* v. *Stone*, *supra*, an offspring of *Schiller* and an admiralty case, see *infra*); *Amerio Contact Plate-Freezers, Inc.* v. *Knowles*, D. C. Cir., 1960, 274 F. 2d 590 (citing [fol. 127] *Schiller* and its progeny, *Petroleum Finance Corp.* v. *Stone*, *supra*, and *United States* v. *Welch*, *supra*, along with two admiralty cases, *Internatio-Rotterdam, Inc.* v. *Thomsen*, 4 Cir., 1955, 218 F. 2d 514 and *Orion Shipping & Trading Co.* v. *United States*, 9 Cir., 1957, 247 F. 2d 755 (in which it appears the district court had jurisdiction)).*

The recent pronouncement in *Amerio Contact Plate Freezers, Inc.*, *supra*, that personal jurisdiction is immaterial, merely assumes the existence of such a doctrine based upon *Schiller* and the subsequent cases which in turn revealed no analysis supporting the conclusion. Similarly, *Hayes* v. *Livermont*, D. C. Cir., 1960, 279 F. 2d 818, filed only several months after *Amerio* and by the same court, merely relies on that case and *Internatio-Rotterdam, Inc.* v. *Thomsen*, *supra*, an admiralty case.

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* *Lumbermens Mut. Casualty Co.* v. *Mohr*, D. C. S. D. Texas, 1949, 87 F. Supp. 727, is a case in which the district court having found a jurisdictional defect nevertheless ordered a transfer under section 1406(a). There is no recognition in the opinion of the problem raised by the jurisdictional defect.

Schiller cannot correctly be accepted, as it appears it mistakenly has been, for the proposition that section 1406 (a) authorizes transfer in the absence of personal jurisdiction of a defendant. In that case the defendants moved to dismiss for lack of personal jurisdiction and improper venue. It was the court which *sua sponte* ordered the transfer. However, on appeal the plaintiff objected to the transfer and the defendant argued in support of the transfer. In assessing that case, it must be recognized that personal jurisdiction requirements are for the benefit of defendants. If a defendant chooses to waive such jurisdictional objections, he may. Thus, any learning to be derived from *Schiller* in regard to Section 1406(a) must be limited to cases in which the defendant may be said to have waived his right to object to the jurisdiction of the trans- [fol. 128] feror court by arguing for the transfer. No such waiver of jurisdictional objections here exists.

The line of cases which have not entirely relied upon *Schiller* are the admiralty cases led by *Internatio-Rotterdam, Inc.* v. *Thomsen, supra.* In *Internatio-Rotterdam*, the transferor court was in the Southern District of New York during the period of a series of successive misconstructions of *Schiller*. Furthermore, while the transferor court did not have full jurisdiction of the respondent, it did possess a type of quasi jurisdiction peculiar to libels in admiralty. In its opinion, the Fourth Circuit stressed that the Judicial Code applies to suits in admiralty (*Ex Parte Collett*, 337 U. S. 55 (1948)), and that in admiralty cases a libel may be filed against a ship in a district in which is located a port at which the ship on the high seas is soon expected and the action is then deemed to be instituted for purposes of meeting the requirement that the action be commenced within the short one-year period of 46 U. S. C. 1303(6). 218 F. 2d at page 515-516; *Ore Steamship Corp.* v. *D/S A/S Hassel*, 2 Cir., 1943, 137 F. 2d 326, 329. During the period between the filing and the time the ship actually reaches port so that it may be attached and thus be subjected to jurisdiction in *in rem* proceedings, the admiralty court traditionally has had a quasi jurisdiction to enter "orders as may be appropriate with respect to the issuance or service of process." (218 F. 2d at page 516.) If such traditional power exists in the Admiralty Court, and as

to that there may be serious doubt, no such tradition can be found in civil cases. Judge Parker was careful in *Internatio-Rotterdam* to limit his discussion to admiralty cases, and pointed out, "A suit in admiralty must be distinguished in this respect [commencement of suit] from a civil action based on diversity of citizenship in which venue is limited by statute." (See 68 Harv. L. Rev. 1069 (1955).) [fol. 129] *Orzulak* v. *Federal Commerce and Navigation Co., supra,* previously considered as a case resting in part on *Schiller,* is also an admiralty case.

The greatest respect and deference must be accorded to the words of the late Chief Judge John Parker who would have the purpose of modern standards of procedure "to get away from time-consuming and justice-defeating technicalities" and would have "The Courts of the United States comprise one great system for the administration of justice." (*Internatio-Rotterdam, Inc.* v. *Thomsen, supra,* at page 517.) This may well be the legal Utopia in which we should be entitled to live. In "one great system" possibly there should be no restrictions upon obtaining jurisdiction throughout the system. Why should service be restricted to the State in which the district is located? Why should not service of a summons by mail anywhere in the United States be adequate? Why should service upon specified officers of corporations be necessary? And certainly the bar of a statute of limitations to a highly meritorious suit filed one day too late or the loss of the right to appeal because of a filing on the 31st day are seemingly, "justice-defeating technicalities." Yet the collective wisdom of our lawmakers has both formulated and maintained these rules. From time to time liberalizing measures have been enacted as to methods of service but almost invariably after legislative deliberation. Therefore, short of some legal millennium, jurisdictional limitations are a reality.

Addressing themselves to the question of whether a district court may transfer an action under section 1406(a) when the conditions are that the court lacks jurisdiction over the person of the defendant as well as there existing a defect in venue, several judges of this circuit, along with Judge Palmieri below, have concluded that the section warrants no such construction. *Independent Products Corp.* v.

[fol. 130] *Loew's, Inc.*, S. D. N. Y., 1957, 148 F. Supp. 460, 462; *Fistel* v. *Beaver Trust Co.*, S. D. N. Y., 1950, 94 F. Supp. 974, 976; cf. *First National Bank of Chicago* v. *United Air Lines*, 7 Cir., 1951, 190 F. 2d 493, 496, cert. den. 341 U. S. 903, cert. subsequently granted 342 U. S. 875, rev'd on other grounds, 342 U. S. 396 (1952);[10] Semble under 28 U. S. C. 1404(a), *Hargrove* v. *Louisville & Nashville Ry. Co.*, W. D. Ky., 1957, 153 F. Supp. 681; *McDaniel* v. *Drotman*, W. D. Ky., 1952, 103 F. Supp. 643; *Wilson* v. *Kansas City So. Ry.*, W. D. Mo., 1951, 101 F. Supp. 56; cf. *Scarmardo* v. *Mooring*, S. D. Tex., 1950, 89 F. Supp. 936; see U. Cinn. L. Rev. 357 (1954).

Goldlawr expresses the fear that if the district court here is upheld that section 1406(a) will never be applicable to corporate defendants in antitrust cases. Section 1406(a) as part of the general venue statutory provisions was not enacted to aid or impede antitrust cases. Congress eased the problem of commencing an antitrust action and of obtaining jurisdiction over defendants in a district in which venue is properly laid through the passage of section 12 of the Clayton Act. Goldlawr's real difficulty here is that it has failed to meet the requirements of that section.

[fol. 131] The determination that section 1406(a) does not authorize a district court to transfer a case when it merely finds venue has been improperly laid but does not have personal jurisdiction over the defendant is not at all prompted by a belief that a contrary rule would be undesirable. Con-

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[10] Subsequent to the argument of this case, the Third Circuit decided *Hohensee* v. *News Syndicate, Inc*, 3 Cir., Feb. 8, 1961, —— F. 2d ——, noted at 29 LW 2359. The court held that a district judge lacks the power to transfer an action under section 1406(a) when he does not have jurisdiction over the defendant. In speaking of section 1406(a) the court states:

> "The sole purpose of this section as well as its companion, 28 U. S. C. §1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. * * * We are satisfied that section 1406 was never intended to serve as a means of avoiding the consequences of a failure to perfect service of process. It would take a clear congressional mandate for this court to allow that section to be used as a shorthand method for assisting a party to effect jurisdiction of the person."

vincing policy arguments can be marshalled for a more liberal transfer statute, although abuses can be imagined if the construction urged by Goldlawr were accepted, but these arguments should be made to the legislature. If after due consideration of such policies and of all competing views the broader transfer statute be thought to be desirable, a section which specifically provides for the procedural innovation might be favorably received by Congress. Any attempt by the courts to enact by their decisions so radical a procedural innovation, particularly where the effect of such decisions is to narrow the requirement of jurisdiction over the person, would invade legislative territory. See *Miner* v. *Atlass, supra.*

In passing, it is noted that even if the Pennsylvania District Court did have the authority under 28 U. S. C. 1406(a) to transfer the case in the absence of personal jurisdiction over the defendants, as we hold it did not, the transfer might well have been defective as to defendant Heiman because he died prior to the attempted transfer and no administrator was appointed to represent him in this litigation until after the invalid transfer. See Fed. Rules of Civ. Pro. 25(a)(1); *United States* v. *Field*, C. C. S. D. N. Y., 1859, 25 Fed. Cas. 1067. Because the validity of the transfer as to all appellees is disposed of on other grounds, that matter need not be pursued.

As Judge Palmieri pointed out, the transferor court being unauthorized to order the transfer under section 1406(a), the only alternatives for the transferee court are to remand the case back to the transferor or to dismiss. [fol. 132] Since it has already been determined that venue is improper in Pennsylvania, it would be a sterile gesture to remand the action to be transferred back to the District Court for the Eastern District of Pennsylvania.

The judgment below is affirmed.

Hincks, Circuit Judge (dissenting in part):

I agree with my brothers that the order below as to Heiman should be affirmed. See *United States* v. *Field*, C. C. S. D. N. Y., 25 Fed. Cas. 1067.

But I would hold that the transfer was proper as to Select and United, notwithstanding the absence of effective

personal service on them in Pennsylvania. It was so held in *Amerio Contact Plate Freezers* v. *Knowles*, D. C. Cir., 274 F. 2d 390, in an opinion which was entered after the opinion below. The court there said, in speaking of such a transfer, "The court's lack of jurisdiction over the person of the defendant is immaterial." This holding was followed in *Hayes* v. *Livermont*, D. C. Cir., 279 F. 2d 818. And in *Internatio-Rotterdam, Inc.* v. *Thomsen*, 4 Cir., 218 F. 2d 514, it was so held. To be sure, *Internatio* was an admiralty case and the appellees urge that its holding must be restricted to admiralty cases. I do not agree. There the power of transfer prior to any service was held to be authorized under 28 U. S. C. §1406(a). In speaking of a situation in which when the libel was filed neither a proper respondent nor property was within the transferor district but a vessel was expected shortly to appear, Judge Parker said:

> "When suit is so instituted, which has the effect of preserving the rights of libellant against the running of the statute, and the vessel does not appear in the [fol. 133] district as anticipated but does appear or is expected to appear in another district, it seems clearly within both the letter and the spirit of 28 U. S. C. §1406(a) to transfer the case, in the interest of justice, as having been brought in the wrong district, since the vessel cannot be served there and must be served before the case can proceed."

Often in actions at law the situation is not significantly different. When a complaint is filed in a particular district the complications of fact and uncertainties of law may be such that the plaintiff cannot be sure that venue or service of process in the district will be sustained (much as a libelant cannot be sure that an expected vessel will arrive in the district). When after long controversy it is adjudicated that the venue is improper, as was the case here, I think "the letter and spirit of 28 U. S. C. §1406(a)" just as in the *Internatio* situation requires a transfer to a district in which venue can be properly laid and the defendant can be served. The policy underlying transfers in admiralty cases is equally applicable to actions at law. As Judge Parker, in *Internatio*, so well said:

"Certainly such transfer is in accord with modern standards of procedure, the purpose of which is to get away from time-consuming and justice-defeating technicalities and secure an adjudication of the rights of the parties by as direct and as expeditious a route as possible. The courts of the United States comprise one great system for the administration of justice."[1]

[fol 134] Numerous district court decisions reach the the same result. *Orzulak* v. *Federal Commerce and Navigation Co.*, D. C. E. D. Pa., 168 F. Supp. 15; *United States* v. *Welch*, D. C. S. D. N. Y., 151 F. Supp. 899; *Petroleum Fin. Corp.* v. *Stone*, D. C. S. D. N. Y., 116 F. Supp. 426 (transfer under §1404(a)); *Lumbermens Mut. Cas. Co.* v. *Mohr*, D. C. S. D. Texas, 87 F. Supp. 727; *Schiller* v. *Mit-Clip Co., Inc.*, D. C. S. D. N. Y., unreported, appeal dismissed 180 F. 2d 654.[2]

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[1] I agree with the judge below and with my brothers that the decision of this court in *Schiller* v. *Mit-Clip*, 180 F. 2d 654, does not speak to the precise question now raised although other cases have given *Schiller* a more expansive reading. But after all, this court in *Schiller*, even if it did not pass upon the validity of a transfer made without personal jurisdiction, at least allowed such a transfer to stand.

[2] Personal jurisdiction over the defendant was held at least by implication to be a prerequisite to a §1406(a) transfer in *Independent Productions Corp.* v. *Loew's, Inc.*, D. C. S. D. N. Y., 148 F. Supp. 460, 467. See *Fistel* v. *Beaver Trust Co.*, D. C. S. D. N. Y., 94 F. Supp. 974 (unclear whether ruling based on 1406(a) or 1404(a)). Several cases have held personal jurisdiction a prerequisite to transfer under 1404(a), *McDaniel* v. *Drotman*, D. C. W. D. Ky., 103 F. Supp. 643; *Hargrove* v. *Louisville & N. R.R.*, D. C. W. D. Ky., 153 F. Supp. 681; *Wilson* v. *Kansas City So. Ry.*, D. C. W. D. Mo., 101 F. Supp. 56; *Scarmardo* v. *Mooring*, D. C. S. D. Tex., 89 F. Supp. 936; *In re Josephson*, 1 Cir., 218 F. 2d 174, 185 (not "in the interests of justice" to transfer under 1404(a) before transferor court obtains personal jurisdiction).

However, since 1404(a) is the statutory articulation of the doctrine of *forum non conveniens*, these cases may be based on the historical fact that that doctrine was not applicable "if there is absence of jurisdiction," *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504. Moreover it may be noted that in 1404(a) cases the liberal objective of the doctrine will not be materially impaired by requiring personal jurisdiction as a prerequisite to transfer since in

Since the requirements which support venue under §12 of the Clayton Act and which support amenability to service of process whereby personal jurisdiction may ordinarily be obtained are so nearly the same, the appellant argues that seldom if ever would a plaintiff be privileged [fol. 135] to invoke §1406(a) against a corporate defendant in a private antitrust action if personal jurisdiction were a prerequisite. For in cases in which personal jurisdiction may be acquired by service within the district there would be no defect of venue; it is generally only when the defendant cannot be served within the district that venue would be defective. The appellees counter with the argument that under §12 of the Clayton Act a defendant, even if not amenable to local service, may be subjected to the jurisdiction by extraterritorial service, so that personal jurisdiction may be obtained even when venue is improper. But if §12 is available when venue is improper, the only ground upon which the appellees attack the transfer to the court below is gone. For prior to the transfer the appellant did make extraterritorial service on the appellees, as my brothers recognize.[1] The judge below, on the other hand, held that §12 by its terms was available only in cases in which venue was proper (i.e., cases brought "not only in the judicial district whereof it [the defendant] is an inhabitant, but also in any district wherein it may be found or transacts business"). If this interpretation of §12 be right, there is weight in the above-stated contention of the appellant that to read into §1406(a) of the Code a requirement of personal jurisdiction, as in effect the appellees ask us to do, would go far to nullify the liberal objective of §1406(a): it would then, if I may resort to an Irish bull, be available only when there was no occasion for its use. That interpretation of §1406(a) I would think neither desirable nor required.

1404(a) cases, unlike 1406(a) cases, venue is an indispensable prerequisite and hence personal jurisdiction except in occasional diversity cases can be easily obtained.

Whether personal jurisdiction is a prerequisite to transfer under 1404(a), is not now before us.

[1] See majority opinion, footnote 1.

The appellees argue that my construction of §1406(a) will invite its abuse. But I am not impressed by the procedural spectres which they conjure up to bolster this [fol. 136] argument.[4] I do not suggest that a transfer by a court without personal jurisdiction will "cure" the jurisdictional defect; the defendants would still have to be properly served before their substantive rights could be affected. And in any event, if a plaintiff attempts to make improper use of the Act the court, "in the interests of justice," may refuse to order the transfer.

Certainly in this case no improper tactics seem to be present. The plaintiff for aught that appears had some reason for laying venue in Pennsylvania, its home state. After a substantial controversy it prevailed as to some defendants and failed as to others, including these appellees. Doubtless in bringing suits against all in Pennsylvania it was actuated by the hope of prosecuting its claim against all the defendants in one action in its home forum. There was nothing improper in that: indeed, the law frowns upon needless severance of trials and provides some flexibility to accommodate the convenience of litigants. Doubtless plaintiff was also actuated by a desire to hold the filing date of its complaint as marking the period for which damages would be recoverable: if compelled to serve the appellees anew in New York it would lose the right to recover for damages which had accrued in the earlier part of the statutory period under its original complaints. But this consideration, also, was completely consistent with its good faith: indeed, at least in the circumstances of this case, that factor might be considered as one in the interest of justice tending to support the transfer. *Per contra*, it would not have been a wise use of discretion to withhold the transfer merely to provide the appellees with immunity for part of the statutory period. [fol. 137] I think that considerations of procedural policy unite with the weight of precedent in support of the construction I have put on the Act. The only court of appeals

[4] If there were substance to such spectres one would expect the appellees to refer to actual cases instead of to hypothetical cases only.

decision which supports my brothers is *Hohensee* v. *News Syndicate*, referred to in footnote 10 of the majority opinion. With deference, I can only say that that case, like the opinion of my brothers herein, wholly without Congressional sanction reads into §1406 a restriction on a salutary procedural provision which is not there. And a careful reading of its Congressional history does not suggest to me that such a restriction was intended. I would hold that the transfer was made not only legally but also in a wise exercise of discretion.

[fol. 138]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GOLDLAWR, INCORPORATED, Plaintiff-Appellant,

v.

MILTON SHUBERT, WILLIAM KLEIN, SYLVIA W. GOLDE, MARCUS HIKMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants-Appellees.

JUDGMENT—February 21, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro, Clerk.

[fol. 139]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GOLDLAWR, INCORPORATED, Plaintiff-Appellant,

v.

MILTON SHUBERT, WILLIAM KLEIN, SYLVIA W. GOLDE, MARCUS HIEMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC., Defendants-Appellees.

JUDGMENT—February 21, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 140] Clerk's Certificate (omitted in printing).

[fol. 141]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

OPINIONS BELOW.

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit are not yet reported, and are printed in Appendix A to this Petition. The opinion of the United States District Court for the Eastern District of Pennsylvania is found at 169 F. Supp. 677 and is printed (together with the said court's order of transfer) in Appendix B to this Petition. The opinion of the United States District Court for the Southern District of New York is found at 175 F. Supp. 793 and is printed in Appendix C to this Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 21, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

In a private antitrust action instituted by petitioner in the Eastern District of Pennsylvania, the District Court determined that venue was improper as to the defendant-respondents and pursuant to 28 U. S. C. § 1406(a), severed and transferred the action as to them to the Southern District of New York where venue was proper. The District Court for the Southern District of New York dismissed the action as against respondents for lack of jurisdiction on the ground that the District Court for the Eastern District of Pennsylvania did not have personal jurisdiction over them and therefore had no power to order the transfer. The Court of Appeals for the Second Circuit affirmed. The question presented by this petition is whether the District

Court for the Eastern District of Pennsylvania, having jurisdiction over the subject matter of the instant action, had the power to transfer the case for improper venue under 28 U. S. C. § 1406(a) without having obtained personal jurisdiction over the transferred respondents?

STATUTES INVOLVED.

Section 1406(a) of 28 U. S. C. provides as follows:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Section 12 of the Clayton Act, 38 Stat. 736, 15 U. S. C. § 22 provides as follows:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district where it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

FILED
MAY
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1969.

No. 9??

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case	4
Reason for Allowing Writ	6
I. The Court of Appeals Has Imposed an Unwarranted and Unduly Restrictive Interpretation Upon an Important Federal Procedural Statute	6
II. The Decision Below Conflicts With Decisions of the Fourth, Ninth and District of Columbia Courts of Appeals	10
Appendix A—Opinion of the United States Court of Appeals for the Second Circuit	1a
Appendix B—Opinion of the United States District Court for the Eastern District	20a
Order (3/3/59)	42a
Order of Transfer (3/3/59)	43a
Appendix C—Opinion of the United States District Court for the Southern District of New York	44a

TABLE OF CASES CITED.

	Page
Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F. 2d 590 (1960)	10, 11
Goldlawr, Inc. v. Heiman, 273 F. 2d 729	5
Hayes v. Livermont, 279 F. 2d 818 (1960)	10
Hohensee v. News Syndicate, Inc., 286 F. 2d 527 (1961)	10
Internatio-Rotterdam, Inc. v. Thomsen, 218 F. 2d 514 (4th Cir. 1955)	6, 8, 10, 11, 12
Lumbermens' Mut. Cas. Co. v. Mohr, 87 F. Supp. 727 (S. D. Tex. 1949)	10
Orion Shipping & Trading Co. v. United States, 247 F. 2d 755 (1957)	10
Radovich v. National Football League, 352 U. S. 445 (1957)	9
Schiller v. Mit-Clip Co., 180 F. 2d 654 (2d Cir. 1950)	11, 12
United States v. Shubert, Civil Action 56-72, United States District Court for the Southern District of New York, 1956 Trade Cases, paragraph 68, 272	4

STATUTES AND AUTHORITIES CITED.

	Page
Automobile Dealers Act, 15 U. S. C. § 1222	8
Clayton Act, as amended (33 Stat. 736):	
Section 4, 15 U. S. C. § 15	5, 8, 9
Section 5(b), 15 U. S. C. § 16(b)	4, 9, 12
Section 12, 15 U. S. C. § 22	3, 4, 5, 8, 9
Copyright Act, 28 U. S. C. § 1400(a)	8
Federal Employers' Liability Act, 45 U. S. C. § 56	8
Federal Rules of Civil Procedure:	
Rule 3	12
Rule 25(a)(1)	5
Rule 54(b)	5
Interlocutory Appeals Act, 28 U. S. C. § 1292(b)	5
Investment Companies Act, 15 U. S. C. § 80a-43	8
Judicial Code (1948 Revision):	
Section 1404(a), 28 U. S. C. § 1404(a)	7
Section 1406(a), 28 U. S. C. § 1406(a)	2, 3, 5, 6, 7, 10, 11, 12
1 Moore, Federal Practice, para. 0.146(5), p. 1908, at n. 11 (2d ed. 1960)	10
1 Moore, Federal Practice, para. 0.146(6), p. 1910 (2d ed. 1960)	7
2 Moore, Federal Practice, para. 3.07(5), p. 787, at n. 4	12
Public Utilities Companies Act, 15 U. S. C. § 79y	8
Securities Act of 1933, 15 U. S. C. § 77(v)	8
Securities Exchange Act of 1934, 15 U. S. C. § 77aa	8
Senate Report No. 303, 81st Cong. 1st Sess., U. S. Code Cong. Serv. 1253 (1949)	7
Sherman Antitrust Act, Sections 1 and 2 (15 U. S. C. §§ 1 and 2)	4
Taft-Hartley Act, 29 U. S. C. § 160(e), (f), (j)	8
28 U. S. C. § 1254(1)	3
28 U. S. C. § 1391(c)	8
28 U. S. C. § 1391(d)	8
28 U. S. C. § 1395	8

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

GOLDLAWR, INCORPORATED,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Goldlawr, Incorporated, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

This is a private antitrust action brought pursuant to Sections 1 and 2 of the Sherman Antitrust Act (15 U. S. C. §§ 1 and 2) against Jacob Shubert and several other persons and corporations identified with the Shubert interests in the legitimate theatre business. Petitioner, which operates a legitimate theatre in the City of Philadelphia, alleged injury to its business as a result of defendants' nation-wide monopoly and conspiracy to unreasonably restrain commerce in the legitimate theatre business and sought treble damages and an injunction. The action was instituted by petitioner in the District Court for the Eastern District of Pennsylvania on October 17, 1956,[1] within one year after the entry of the consent decree in United States v. Shubert, Civil Action 56-72, United States District Court for the Southern District of New York, 1956 Trade Cases, paragraph 68, 272, in order to secure the benefits of Section 5(b) of the Clayton Act (15 U. S. C. § 16(b)), providing for the tolling of the statute of limitations during the pendency of a government action.

Service was originally made upon all defendants at the Shubert's Philadelphia office. Subsequently respondents, Select Operating Corporation and United Booking Office, Inc., were also served in New York City by means of alias summonses as provided by Section 12 of the Clayton Act, 15 U. S. C. § 22. Certain of the defendants, including respondents, filed motions to dismiss for lack of jurisdiction and improper venue and to quash the returns of service,

1. A second complaint with almost identical allegations, but which added certain defendants not here involved and extended the period of which damages were sought, was filed on February 18, 1957. At the same time petitioner amended the original complaint to include the extended damage period. The two actions were consolidated in the Southern District of New York after transfer. Appellant's Appendix in the Court of Appeals, p. 6a and will be treated as one case for the purpose of this Petition.

claiming they resided and transacted business only in New York City. The District Court for the Eastern District of Pennsylvania denied the motions as to some of the defendants, but as to others, including respondents, held that venue in the Eastern District of Pennsylvania was improper, under Sections 4 and 12 of the Clayton Act (15 U. S. C. §§ 15 and 22), on the ground that these defendants did not reside, have agents, or transact business in the Eastern District of Pennsylvania. However, instead of dismissing the case against these defendants, the court "in the interest of justice" severed and transferred the action as against them to the Southern District of New York pursuant to Section 1406(a) of the Judicial Code.

After transfer, respondents once again moved to dismiss the action for lack of jurisdiction,[2] and, on January 27, 1960, the District Court for the Southern District of New York granted the motion, holding that the respondents were not properly served while the case was pending in the Eastern District of Pennsylvania and, therefore, the district court there had no power to transfer the case. The Court of Appeals for the Second Circuit, Judges Moore and Waterman, affirmed;[3] Judge Hincks dissented.

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2. At the same time, petitioner moved to substitute as defendants the executors of the Estate of Marcus Heiman, who had died while the District Court for the Eastern District of Pennsylvania was considering the motions to dismiss. The courts below in addition to holding that the Eastern District of Pennsylvania had no power to transfer the case as to Heiman as well as the corporate respondents, also held that the executors could not be substituted pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure. The remaining transferred defendants, Sylvia W. Golde, Milton Shubert and William Klein did not move to dismiss the action and the case is still pending against them in the Southern District of New York.

3. The appeal was taken pursuant to the Interlocutory Appeals Act 28 U. S. C. § 1292(b). An earlier appeal was held to be improperly taken pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, but the court afforded the petitioner an opportunity to proceed under Section 1292(b). *Goldlawr, Inc. v. Heiman*, 273 F. 2d 729.

REASON FOR ALLOWING WRIT.

Certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit in the instant case because:

(1) there is involved an important question concerning the operation of the federal judicial system which has not been decided by this Court, and

(2) the Court's construction of Section 1406(a) of the Judicial Code is in conflict with the decisions of the Court of Appeals for the District of Columbia and the Fourth and Ninth Circuits.

I. The Court of Appeals Has Imposed an Unwarranted and Unduly Restrictive Interpretation Upon an Important Federal Procedural Statute.

The Congressional purpose in enacting Section 1406(a) as part of the 1948 revision of the Judicial Code was a liberalizing one. Previous thereto a district court was required to dismiss an action where venue was laid in the wrong district. Section 1406(a), as amended,[4] gives the court the choice of either dismissing the action or "in the interest of justice" transferring the case to a district where venue is proper. This purpose is "in accord with modern standards of procedure, the purpose of which is to get away from time-consuming and justice defeating technicalities."[5]

The Court of Appeals for the Second Circuit, however, purporting to rely on the Congressional history of Sec-

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4. Section 1406(a), as originally enacted in 1948, required the district court to transfer an action in which venue was improperly laid. The 1949 amendment gave the court the discretion to dismiss or, in the interest of justice, transfer.

5. Chief Judge Parker in *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514, 517 (4th Cir. 1955).

tion 1406(a)[6] held that a district court cannot transfer an action "in the interest of justice," even when venue is improper, unless the court has personal jurisdiction over the defendant sought to be transferred. No such limitation on the exercise of Section 1406(a) is expressly found in the Judicial Code and the Congressional reports do not consider the question now before the Court. As Judge Hincks noted in his dissent below, such a requirement is "wholly without Congressional sanction and reads into § 1406 a restriction on salutary procedural provision which is not there. And a careful reading of its Congressional history does not suggest to me that such a restriction was intended."[7] It is therefore petitioner's contention that Section 1406(a) authorizes a district court to transfer any action in which it has jurisdiction over the subject matter, even though the court has not acquired personal jurisdiction over the defendant, and that the decision of the court below is unwarranted and unduly restrictive.[8]

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6. Chiefly Senate Report No. 303, 81st Cong. 1st Sess., U. S. Code Cong. Serv. 1253 (1949). The court below also relied on the cases interpreting sections 1404(a) of the Judicial Code, 28 U. S. C. § 1404(a). Section 1404(a) is a codification of the common law doctrine of forum non conveniens and in applying this doctrine it has been customary to require the transferring court to have personal jurisdiction over the defendant. Furthermore, Section 1404(a) permits transfer only when venue is proper, although inconvenient, and, therefore, serves a completely different purpose than Section 1406(a). For these reasons, the cases under 1404(a) are not relevant to the construction of Section 1406(a).

7. Appendix A, p. 19a.

8. Despite respondent's contentions below, Section 1406(a) will not be subject to abuse if this interpretation is accepted. Respondents' argument to this effect was effectively met by Judge Hincks:

> ". . . I am not impressed by the procedural spectres which they conjure up to bolster this argument. I do not suggest that a transfer by a court without personal jurisdiction will 'cure' the jurisdictional defect; the defendants will have to be properly served before their substantive rights would be affected. And in any event, if a plaintiff attempts to make improper use of the Act in the court 'in the interests of justice' may refuse to order the transfer." Appendix A, pp. 17a-18a.

See also 1 *Moore, Federal Practice*, para. 0.146(6), p. 1910 (2d ed. 1960).

Furthermore, this decision may have far reaching effect not only for private suitors under the antitrust laws,[9] but for all litigants bringing suit under the many federal statutes governed by similar venue provisions which allow the institution of suit in a district where the defendant is found or transacts business.[10] Cases instituted pursuant to these statutes, constitute an important segment of federal litigation, both in amount and character and, for the most part, are in areas where there is a Congressional policy to encourage and facilitate government and private suits.

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9. In addition to Section 12 of the Clayton Act which prescribes the venue for corporate defendants, Section 4 sets forth equally broad venue provisions with respect to individual defendants. 15 U. S. C. § 15.

10. The following types of federal cases are governed by special venue provisions permitting the institution of suit in a district wherein the defendant is found or transacts business.

(a) Actions for recovery of fines, penalties or forfeitures. 28 U. S. C. § 1395.

(b) Actions under the Copyright Act. 28 U. S. C. § 1400 (a).

(c) Libels in Admiralty. *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514 (4th Cir. 1955).

(d) Actions under the Securities Act of 1933, 15 U. S. C. § 77(v).

(e) Actions under the Securities Exchange Act of 1934, 15 U. S. C. § 77aa.

(f) Actions under the Public Utilities Companies Act, 15 U. S. C. § 79y.

(g) Actions under the Investment Companies Act, 15 U. S. C. § 80a-43.

(h) Actions under the Automobile Dealers Act, 15 U. S. C. § 1222.

(i) Actions under the Taft-Hartley Act, 29 U. S. C. § 160 (e), (f), (j).

(j) Actions under the Federal Employers' Liability Act, 45 U. S. C. § 56.

The general federal venue statute also contains similarly liberal venue provisions governing civil actions against alien defendants, 28 U. S. C. § 1391(d) and corporate defendants, 28 U. S. C. § 1391(c).

In all such cases the decision below would prohibit transfer and require dismissal even though the plaintiff believed in good faith that he was commencing suit in a district where venue was proper and process could be served, and the district court decided in the interest of justice to transfer the case to a district where venue was proper. The hardship this decision can cause a plaintiff is illustrated quite clearly in the instant case. Petitioner's complaint was filed in the Eastern District of Pennsylvania [11] within one year of the entry of a consent decree in a government suit alleging similar antitrust violations, thereby entitling petitioner to the benefit of the tolling of the statute of limitations under Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b). Through no fault of the petitioner, the district court's decision that venue was improper with respect to respondents was rendered over two years later. By that time the larger part of the petitioner's claim was barred by the statute of limitations and, unless the transfer is upheld, will be unrecoverable without any consideration as to the merits thereof.

This result is contrary to the Congressional policy, as demonstrated by the liberal venue [12] and tolling [13] provisions, to facilitate the private antitrust suitor's prosecution of his claim against alleged antitrust violators and the teaching of this Court in *Radovich v. National Football League*, 352 U. S. 445, 454 (1957) that: "in the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws." A view more con-

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11. Petitioner's good faith in instituting the action in the Eastern District of Pennsylvania is demonstrated by the fact that the District Court upheld petitioner's contentions that some of the New York's defendants were represented in Philadelphia and only rejected them with respect to respondents after long deliberation and study of the facts.

12. Sections 4 and 12 of the Clayton Act, 15 U. S. C. §§ 15 and 22.

13. Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b).

sistent with this policy is expressed by Judge Hincks who, in his dissenting opinion below, pointed out that the avoidance of the excision of a significant period of damages was a reason "in the interest of justice" why the transfer should have been found proper.[14]

It is submitted, that the decision of the court below with respect to the construction and scope of Section 1406(a) does unduly burden the private litigant without express Congressional authority and, therefore, raises an important question of Federal law which should be decided by this Court.

II. The Decision Below Conflicts With Decisions of the Fourth, Ninth and District of Columbia Courts of Appeals.

The Fourth Circuit in *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514 (1955), the Ninth Circuit in *Orion Shipping & Trading Co. v. United States*, 247 F. 2d 755 (1957), and the District of Columbia Circuit in *Amerio Contact Plate Freezers, Inc. v. Knowles*, 274 F. 2d 590 (1960) and *Hayes v. Livermont*, 279 F. 2d 818 (1960), have approved transfers under Section 1406(a) where venue is laid in a wrong district without regard to the existence in the transferor district of jurisdiction over the transferred parties.[15]

The rule set forth in these cases is succinctly stated in the following excerpt from the opinion of the Court of Appeals for the District of Columbia in the *Amerio* case (274 F. 2d at 591):

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14. Appendix A, p. 18a. See also 1 *Moore, Federal Practice* para. 0.146(5), p. 1908, at n. 11 (2d ed. 1960).

15. See also *Lumbermens' Mut. Cas. Co. v. Mohr*, 87 F. Supp. 727 (S. D. Tex. 1949). The Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc.*, 286 F. 2d 527 (1961) has taken the same position as the court below.

> . . . The court had jurisdiction of the subject matter, and the defect of venue could be cured by transfer. The court's lack of jurisdiction over the person of the defendant is immaterial. . . .

The Fourth Circuit noted in *Internatio-Rotterdam, Inc. v. Thomsen* (218 F. 2d at 516) that the power of transfer under 1406(a) was not any less because process had not been served, "when failure to make the transfer may result not only in inconvenience but also in denial of justice to one of the parties." The court rejected the contention that no transfer order can be entered until personal jurisdiction has been acquired thusly:

> . . . This argument fails, however, to distinguish between acquiring jurisdiction over the proceedings commenced before the court and acquiring jurisdiction over person or property; and it is the former, not the latter with which we are concerned here. Certainly the court has no power to enter judgment against person or property until process has been duly served, but it by no means follows that it is without power to enter orders in the cause which are necessary to the maintenance of the litigation itself. . . .

These cases are diametrically opposed to the decision of the court below and this conflict could not be avoided by the court in its opinion. In fact, the only reason given for refusing to follow the *Amerio* case was that the Court of Appeals for the District of Columbia had misapplied the Second Circuit's own decision in *Schiller v. Mit-Clip Co.*, 180 F. 2d 654 (2d Cir. 1950). In the *Schiller* case, the Court of Appeals dismissed an appeal from an order transferring a case under Section 1406(a), even though the transferor court did not have personal jurisdiction over the defendant. The majority opinion below notes that the defendant in *Schiller* had waived the jurisdictional defect and that the case therefore provides no basis for the holding in *Amerio*

that a district court has power under section 1406(a) to transfer a case without personal jurisdiction over the defendant. However, as pointed out by Judge Hincks, the *Schiller* decision is likewise no authority for the instant case, since the court therein "even if it did not pass upon the validity of a transfer made without personal jurisdiction, as least, allowed such a transfer to stand".[16]

Although Judges Moore and Waterman did attempt to distinguish the Fourth Circuit's decision in *Internatio-Rotterdam v. Thomsen, supra*, on the ground that it was limited to admiralty actions,[17] they were forced to recognize that Chief Judge Parker's opinion in *Internatio* was based not upon any special admiralty rule, but upon the interpretation of Section 1406(a) expressly rejected by them.[18]

It is submitted, therefore, that a conflict does exist between the various Courts of Appeals concerning the construction and scope of Section 1406(a) of the Judicial Code which conflict should be resolved by this Court.

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16. Appendix A, p. 16a.

17. In the course of his opinion in *Internatio*, Chief Judge Parker had stated that, since the mere filing of a libel in admiralty stops the running of the statute of limitations even without seizure of the ship, there was a quasi-jurisdiction in the transferor court to enter orders appropriate to the issuance of process, including the transfer of the case to a district where service of process could be effected. The court below intimated that this was not true in civil cases other than in admiralty and pointed out that Judge Parker had in his opinion distinguished *Internatio* in this respect from "a civil action based on diversity."

This is not a diversity case, however, but one founded upon the federal antitrust laws and, therefore, *Internatio* is not distinguishable from the instant case for the reason given. Pursuant to section 5(b) of the Clayton Act, as amended, 15 U. S. C. § 16(b), a cause of action under the antitrust laws is not barred if "commenced" within the specified time. A civil action is commenced in the federal courts by "filing a complaint with the Court" (Rule 3, Federal Rules of Civil Procedure), and the running of the statute of limitations is stopped thereby even though there has been no service of process. See cases cited in 2 *Moore, Federal Practice* para. 3.07(5), p. 787, at n. 4.

18. Appendix A, p. 11a.

For the reasons set forth certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Before: HINCKS, WATERMAN and MOORE, *Circuit Judges.*

Appeal under 28 U. S. C. § 1292(b) from an order of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, dismissing an antitrust action against the appellees because of improper transfer under 28 U. S. C. § 1406(a) and denying plaintiff-appellant's motion to substitute the executors of a defendant who had died never having been served.

Affirmed.

HAROLD E. KOHN, Philadelphia, Pa., (Curtis Mallet-Prevost, Colt & Mosle, New York City, Dolores Korman and Dilworth, Paxon, Kalish, Kohn & Dilks, Philadelphia, Pa., on the brief), *for plaintiff-appellant.*

AARON LIPPER, New York City (Lipper, Shinn & Keeley, and Richard B. Dannenberg, New York City, on the brief), *for Morgan Guaranty Trust Company and Asher Levy, Executors of the Estate of Marcus Heiman, Deceased.*

C. RUSSELL PHILLIPS, Philadelphia, Pa. (Gerald Schoenfeld, Bernard B. Jacobs, Lipper, Shinn & Keeley, New York City, Hugh G. Moulton, and Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., on the brief), *for defendants-appellees, Select Operating Corporation and United Booking Office, Inc.*

MOORE, *Circuit Judge:*

Pursuant to leave granted by this Court (March 7, 1960); 28 U. S. C. § 1292(b)), plaintiff, Goldlawr, Incorporated (Goldlawr), appeals from an order (January 27, 1960) dismissing the complaints in two actions filed jointly in the Southern District of New York against Select Operating Corporation (Select) and United Booking Office, Inc. (UBO) "for lack of jurisdiction over the persons of such defendants." Goldlawr also appeals from the order as to the defendant, Marcus Heiman, deceased, which dismissed for lack of personal jurisdiction and denied its motion to substitute the Executors of the Estate of Marcus Heiman as defendants.

By orders entered in the United States District Court for the Eastern District of Pennsylvania (the Pennsylvania court), these two cases against Select, UBO and certain individuals originally filed in Pennsylvania[1] were transferred "in the interest of justice" to the Southern District of New York (the New York court) "conformably to 28 U. S. C. A. § 1406(a)."[2] Thereafter, Select, UBO and four individual defendants, appearing specially, moved to dis-

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1. Suit originally was instituted on October 17, 1956, in Philadelphia. Alias summonses were served on Select and UBO in New York City. A second suit was filed in Philadelphia on February 18, 1957. The order transferring both cases to New York was dated March 3, 1959. Amended complaints were thereafter served. The amended complaint in New York omitted the defendants as to whom venue had been found to be proper in Pennsylvania; the amended complaint in Pennsylvania omitted those defendants as to whom the actions had been transferred to New York.

The defendant Marcus Heiman died on September 9, 1957, after the Pennsylvania motion to dismiss had been argued but before the order of transfer had been entered.

2. § 1406. Cure or Waiver of Defects.

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." June 25, 1948, c. 646, § 1, 62 Stat. 937; May 24, 1949, c. 139, § 81, 63 Stat. 101.

miss for five reasons: (1) that there had been no service of process on Select or UBO subsequent to the transfer; (2) that there had been no valid service of process on Select or UBO prior to transfer; (3) that without jurisdiction over Select or UBO the Pennsylvania court had no power to order the transfer; (4) that the New York court did not acquire jurisdiction because the transfer was illegal; and (5) that the Pennsylvania court had failed to rule on the motions there made to dismiss for lack of jurisdiction.

The court below held that it "lacks personal jurisdiction over the defendants since effective service of process has never been accomplished." However, it recognized that if transfer were authorized, plaintiff might make proper service in New York, hence determination of the validity of the transfer was necessary on the theory that " if the transfer to this District were authorized, plaintiff might still be in a position to avoid dismissal by making proper service upon defendants without further delay." (175 F. Supp. 793, 796.) It is appropriate therefore for the transferee court or the Court of Appeals of the transferee district to inquire into the propriety of the transfer. See *Hoffman v. Blaski, et al.*, 363 U. S. 335 (1960), by implication; *Arrowhead Co. Inc. v. The Aimee Lykes*, 2 Cir., 1951, 193 F. 2d 83.

Goldlawr, operating a theatre in Philadelphia, sued Select, UBO, the individual defendants and others not involved in this appeal under Sections 1 [3] and 2 [4] of the Sherman Act and Sections 4 [5] and 16 [6] of the Clayton Act, alleging a conspiracy to restrain and monopolize interstate commerce, demanding treble damages and seeking an injunction against the continuance of defendants' allegedly unlawful acts.

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3. 15 U. S. C. 1, July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

4. 15 U. S. C. 2, July 2, 1890, c. 647, § 2, 26 Stat. 209.

5. 15 U. S. C. 15, Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

6. 15 U. S. C. 26, Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

Section 12 of the Clayton Act,[7] 15 U. S. C. 22, specifies where suit against a corporation under the antitrust laws may be brought, namely, in a district where it is an inhabitant and also where "it may be found or transacts business." Conversely, it should follow that if a corporation is not an inhabitant of, is not found in, and does not transact business in, the district, suit may not be so brought. By statutory grant if suit is brought as prescribed in this section "all process in such cases may be served in the district of which it [the corporation] is an inhabitant, or wherever it may be found." Thus, "in such cases," Congress has seen fit to enlarge the limits of the otherwise restricted territorial areas of process. In other words, the extraterritorial service privilege is given only when the other requirements are satisfied.

Upon a motion to dismiss in the Pennsylvania Court, the court held that Select and UBO were not inhabitants of the district or found or transacting business there. However, instead of ruling that therefore the suit could not be brought in the Pennsylvania district, the court, relying on Section 1406(a), 28 U. S. C., treating the motions as "Motions to Dismiss for Improper Venue," ordered the suits transferred to New York (*Goldlawr, Incorporated v. Shubert*, D. C. E. D. Pa., 1958, 169 F. Supp. 677).

The substance of the decision appealed from is that "the privilege of extraterritorial service is expressly confined to actions brought in a district in which the corporation is an inhabitant, found, or transacting business"; that these conditions have not been met and therefore personal jurisdiction was not achieved by service of the alias summonses in New York; that Section 1406(a) which "speaks to defective venue only, cannot be made to do service when

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7. "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." Oct. 15, 1914, c. 323, § 12, 38 Stat. 736.

there is also a jurisdictional defect"; that proper jurisdiction is a basic requirement; and that a Congressional intent to cure jurisdictional defects cannot be found in a mere venue transfer provision. (175 F. Supp. 793). Goldlawr has not here, either in the brief or on oral argument, challenged the determination that the transfer court did not have personal jurisdiction over appellees.

The motion to substitute the heirs of Marcus Heiman was denied and the cross-motion to dismiss for lack of jurisdiction was granted because no personal jurisdiction had ever been obtained as to Heiman before or after the transfer order and because of doubt that Rule 25(a)(1), Fed. R. Civ. P. authorized executor substitution under such circumstances.

It has long been established that federal courts should not assume jurisdiction to decide cases merely because it would be constitutional for Congress to have given them the jurisdiction they seek to exercise. See generally Hart and Wechsler, *The Federal Courts and the Federal System*, 1953, pp. 288-340. "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U. S. 440, 449 (1850). Jurisdiction, over the subject matter and over the person, has been a basic concept of our jurisprudence. Although a defendant may have full knowledge that an action has been commenced against him, a court, nevertheless, lacks jurisdiction to enter a judgment against him unless jurisdiction over his person has been obtained in strict compliance with a statute designating the method of obtaining such jurisdiction. *Wuchter v. Pizzutti*, 276 U. S. 13 (1928). The balancing of competing interests which is involved in determining jurisdictional issues has been repeatedly emphasized by the Supreme Court. *Pennoyer v. Neff*, 95 U. S. 714 (1877); *McDonald v. Mabee*, 243 U. S. 90 (1917); *Hess v. Pawlowski*, 274 U. S. 352 (1927); *Milliken v. Meyer*, 311 U. S. 457 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Because the concept of the power of a court to act and affect the rights of a party is so fundamental, jurisdiction of

courts to act should be based on clear legislative pronouncements. And just as their jurisdiction authority is given to the courts by the legislature, so also must legislative limitations be expanded or removed by the same process. Section 1406(a) provides for the transfer of cases when venue is improper. It does not mention jurisdictional defects. Whatever be the desirability of a rule that a district court may transfer a case when venue is mislaid and jurisdiction over the person of the defendant is lacking, it is an unwarranted exercise of judicial interpretation to find that a statute, expressly providing for transfer to cure a venue defect, impliedly provides for a transfer to cure a more basic jurisdictional defect. The lesser does not by implication include the greater.

The legislative history of Section 1406(a) indicates that the draftsmen never disclosed any belief that in promulgating a provision for transfer in the event of improper venue, they also intended their creation to make transfer possible where jurisdiction is lacking. Section 1406(a) "radically altered prior law" (Moore's Commentary on the Judicial Code, p. 195). Prior to its enactment when venue was found defective, dismissal of the action was mandatory. *Camp v. Gress*, 250 U. S. 308, 316 (1919); *Schoen v. Mountain Producers Corp.*, 3 Cir., 1948, 170 F. 2d 707, 713. Considering the revolutionary character of the change, courts ought to demand a plain expression of the innovation and ought not extend it any further than the statutory language clearly warrants. See *Robertson v. Railroad Labor Board*, 268 U. S. 619, 627 (1925); *Foster-Milburn Co. v. Knight*, 2 Cir., 1950, 181 F. 2d 949, 952. There is no indication, however, in the Congressional history behind the 1948 enactment that would suggest that the section is addressed to anything more than a venue defect.

Section 1406(a) as originally enacted required transfer when venue was improperly laid, but because it was recognized that litigants might abuse the section by purposely bringing an action in a district where venue was improper,

in 1949 Congress amended the section to make transfer discretionary "in the interest of justice." The Senate Report explaining the amendment impliedly evidences a Congressional intent that a prerequisite to the operation of the section is that the court have personal jurisdiction over the parties. The report states:

> "It is thought that the provision [the 1948 version of § 1406(a)] may be subject to abuse in that plaintiff might deliberately bring a suit in a wrong division or district *where he could get service on the defendant*, and when the question of venue is raised the court is required to transfer the case to the court where it could have been brought. However, in the meantime, *service has been perfected on a defendant in the wrong venue*, and it will carry over into the new (and proper) venue." [Emphasis added.] Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949).

Although this statement does not explicitly address itself to a suit in the wrong district where no service can be obtained, implicitly it appears to express a Congressional recognition that section 1406(a) is to be operative only after valid "service on the defendant" giving the court personal jurisdiction.

Goldlawr takes the position that the section does not specifically require personal jurisdiction before transfer and argues that judicial ingenuity should be used to liberalize the statute by decisions that jurisdiction is not required. While it is true that Congress could have provided for the transfer in the absence of personal jurisdiction over defendants, it has not done so.

The scope of judicial authority should not be lightly extended in the absence of a clear statutory basis. While not relevant to the present appeal in its actual holding, *Miner v. Atlass*, 363 U. S. 641 (1960), is nevertheless a warning that federal courts should proceed with caution when considering the merit of implying basic procedural innovations. Although a liberal transfer statute might be

wise, such a change is more properly a subject for legislative action after "mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration [legislative] affords." *Miner v. Atlass, supra,* p. 650.

Chapter 87, Title 28, United States Code, enacted into positive law, by its organization, is persuasive of the conclusion that Congress did not intend section 1406(a) to be more than a statute making it possible for the court to cure venue, not jurisdictional, defects. Chapter 87 is titled "District Courts; Venue" and includes sections 1391 to 1406. Most of the sections dictate venue requirements and specify that a failure to comply with them will be deemed a defect which impedes the cause from going to final adjudication. However, a venue defect can be waived and section 1406 is entitled "Cure or Waiver of Defects." The placement of the section at the end of Chapter 87 suggests that the defects it is to be used to cure are defects caused by failure to comply with the basic sections of the chapter. These are venue defects and not jurisdictional ones.

Furthermore, Goldlawr concedes that under section 1404(a),[8] a legislative sibling to section 1406, "there must be jurisdiction and venue in the transferring district as well as in the district to which the case is transferred." But if jurisdiction is necessary under section 1404(a) which permits transfer for convenience of parties and witnesses so also should this requirement be met when the transfer is made for improper venue. Although the reason for the transfer is different in the two sections, they are under the same general venue heading and there is no indication whatsoever that Congress thought it was dealing with an entirely different subject in section 1406(a).

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8. § 1404. Change of venue.

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." June 25, 1948, c. 646, 62 Stat. 937.

It was merely providing for a way in which to cure a venue defect.

How has it come to pass that Section 1406(a), clear enough in its language and intent, has been now held out as authorizing transfer without personal jurisdiction?

The cases, directing transfer under section 1406(a) despite a lack of personal jurisdiction over the defendant, indicate that the view that the section authorizes transfers even in the absence of personal jurisdiction over the defendant had its genesis in a misconception of the holding of this Court in *Schiller v. Mit-Clip Co.*, 2 Cir., 1950, 180 F. 2d 654. For example, in *Petroleum Financial Corp. v. Stone*, S. D. N. Y., 1953, 116 F. Supp. 426, the court expressed serious doubts as to the propriety of transfer under Section 1406(a) when the transferor court did not have personal jurisdiction over the defendant, but in supposed compliance with *Schiller* granted the transfer. *Petroleum Financial Corp. v. Stone, supra*, has been criticized for misconstruing *Schiller*. (38 Minn. L. Rev. 874 (1954).) The unwarranted construction of the statute based on *Schiller* has gained currency by virtue of repetition. Later cases supposedly following *Schiller* include *United States v. Welch*, S. D. N. Y., 1957, 151 F. Supp. 899 (citing only *Schiller*); *Orzulak v. Federal Commerce and Navigation Co.*, E. D. Pa., 1958, 168 F. Supp. 15 (resting in part on *Petroleum Financial Corp. v. Stone, supra*, an offspring of *Schiller* and an admiralty case, see *infra*); *Amerio Contact Plate Freezers, Inc. v. Knowles*, D. C. Cir., 1960, 274 F. 2d 590 (citing *Schiller* and its progeny, *Petroleum Finance Corp. v. Stone, supra*, and *United States v. Welch, supra*, along with two admiralty cases, *Internatio-Rotterdam, Inc. v. Thomsen*, 4 Cir., 1955, 218 F. 2d 514 and *Orion Shipping & Trading Co. v. United States*, 9 Cir., 1957, 247 F. 2d 755 (in which it appears the district court had jurisdiction)).[9]

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9. *Lumbermens Mut. Casualty Co. v. Mohr*, D. C. S. D. Texas, 1949, 87 F. Supp. 727, is a case in which the district court having found a jurisdictional defect nevertheless ordered a transfer under section 1406(a). There is no recognition in the opinion of the problem raised by the jurisdictional defect.

The recent pronouncement in *Amerio Contact Plate Freezers, Inc., supra,* that personal jurisdiction is immaterial, merely assumes the existence of such a doctrine based upon *Schiller* and the subsequent cases which in turn revealed no analysis supporting the conclusion. Similarly, *Hayes v. Livermont,* D. C. Cir., 1960, 279 F. 2d 818, filed only several months after *Amerio* and by the same court, merely relies on that case and *Internatio-Rotterdam, Inc., v. Thomsen, supra,* an admiralty case.

Schiller cannot correctly be accepted, as it appears it mistakenly has been, for the proposition that section 1406(a) authorizes transfer in the absence of personal jurisdiction of a defendant. In that case the defendants moved to dismiss for lack of personal jurisdiction and improper venue. It was the court which *sua sponte* ordered the transfer. However, on appeal the plaintiff objected to the transfer and the defendant argued in support of the transfer. In assessing that case, it must be recognized that personal jurisdiction requirements are for the benefit of defendants. If a defendant chooses to waive such jurisdictional objections, he may. Thus, any learning to be derived from *Schiller* in regard to Section 1406(a) must be limited to cases in which the defendant may be said to have waived his right to object to the jurisdiction of the transferor court by arguing for the transfer. No such waiver of jurisdictional objections here exists.

The line of cases which have not entirely relied upon *Schiller* are the admiralty cases led by *Internatio-Rotterdam, Inc. v. Thomsen, supra.* In *Internatio-Rotterdam,* the transferor court was in the Southern District of New York during the period of a series of successive misconstructions of *Schiller.* Furthermore, while the transferor court did not have full jurisdiction of the respondent, it did possess a type of quasi jurisdiction peculiar to libels in admiralty. In its opinion, the Fourth Circuit stressed that the Judicial Code applies to suits in admiralty (*Ex Parte Collett,* 337 U. S. 55 (1948)), and that in admiralty cases a libel may

be filed against a ship in a district in which is located a port at which the ship on the high seas is soon expected and the action is then deemed to be instituted for purposes of meeting the requirement that the action be commenced within the short one-year period of 46 U. S. C. 1303(6). 218 F. 2d at page 515-516; *Ore Steamship Corp. v. D/S A/S Hassel*, 2 Cir., 1943, 137 F. 2d 326, 329. During the period between the filing and the time the ship actually reaches port so that it may be attached and thus be subjected to jurisdiction in *in rem* proceedings, the admiralty court traditionally has had a quasi jurisdiction to enter "orders as may be appropriate with respect to the issuance or service of process." (218 F. 2d at page 516.) If such traditional power exists in the Admiralty Court, and as to that there may be serious doubt, no such tradition can be found in civil cases. Judge Parker was careful in *Internatio-Rotterdam* to limit his discussion to admiralty cases, and pointed out, "A suit in admiralty must be distinguished in this respect [commencement of suit] from a civil action based on diversity of citizenship in which venue is limited by statute." (See 68 Harv. L. Rev. 1069 (1955).) *Orzulak v. Federal Commerce and Navigation Co., supra,* previously considered as a case resting in part on *Schiller,* is also an admiralty case.

The greatest respect and deference must be accorded to the words of the late Chief Judge John Parker who would have the purpose of modern standards of procedure "to get away from time-consuming and justice-defeating technicalities" and would have "The Courts of the United States comprise one great system for the administration of justice." (*Internatio-Rotterdam, Inc. v. Thomsen, supra,* at page 517.) This may well be the legal Utopia in which we should be entitled to live. In "one great system" possibly there should be no restrictions upon obtaining jurisdiction throughout the system. Why should service be restricted to the State in which the district is located? Why should not service of a summons by mail anywhere in the United States be adequate? Why should service upon specified

officers of corporations be necessary? And certainly the bar of a statute of limitations to a highly meritorious suit filed one day too late or the loss of the right to appeal because of a filing on the 31st day are seemingly "justice-defeating technicalities." Yet the collective wisdom of our lawmakers has both formulated and maintained these rules. From time to time liberalizing measures have been enacted as to methods of service but almost invariably after legislative deliberation. Therefore, short of some legal millennium, jurisdictional limitations are a reality.

Addressing themselves to the question of whether a district court may transfer an action under section 1406(a) when the conditions are that the court lacks jurisdiction over the person of the defendant as well as there existing a defect in venue, several judges of this circuit, along with Judge Palmieri below, have concluded that the section warrants no such construction. *Independent Products Corp. v. Loew's, Inc.*, S. D. N. Y., 1957, 148 F. Supp. 460, 462; *Fistel v. Beaver Trust Co.*, S. D. N. Y., 1950, 94 F. Supp. 974, 976; cf. *First National Bank of Chicago v. United Air Lines*, 7 Cir., 1951, 190 F. 2d 493, 496, cert. den. 341 U. S. 903, cert. subsequently granted 342 U. S. 875, rev'd on other grounds, 342 U. S. 396 (1952);[10] Semble under 28 U. S. C. 1404(a), *Hargrove v. Louisville & Nashville Ry.*

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10. Subsequent to the argument of this case, the Third Circuit decided *Hohensee v. News Syndicate, Inc.*, 3 Cir., Feb. 8, 1961 — F. 2d —, noted at 29 LW 2399. The court held that a district judge lacks the power to transfer an action under section 1406(a) when he does not have jurisdiction over the defendant. In speaking of section 1406(a) the court states:

> "The sole purpose of this section as well as its companion, 28 U. S. C. § 1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. • • • We are satisfied that section 1406 was never intended to serve as a means of avoiding the consequences of a failure to perfect service of process. It would take a clear congressional mandate for this court to allow that section to be used as a shorthand method for assisting a party to effect jurisdiction of the person."

Co., W. D. Ky., 1957, 153 F. Supp. 681; *McDaniel v. Drotman*, W. D. Ky., 1952, 103 F. Supp. 643; *Wilson v. Kansas City So. Ry.*, W. D. Mo., 1951, 101 F. Supp. 56; *cf. Scarmardo v. Mooring*, S. D. Tex., 1950, 89 F. Supp. 936; see U. Cinn. L. Rev. 357 (1954).

Goldlawr expresses the fear that if the district court here is upheld that section 1406(a) will never be applicable to corporate defendants in antitrust cases. Section 1406(a) as part of the general venue statutory provisions was not enacted to aid or impede antitrust cases. Congress eased the problem of commencing an antitrust action and of obtaining jurisdiction over defendants in a district in which venue is properly laid through the passage of section 12 of the Clayton Act. Goldlawr's real difficulty here is that it has failed to meet the requirements of that section

The determination that section 1406(a) does not authorize a district court to transfer a case when it merely finds venue has been improperly laid but does not have personal jurisdiction over the defendant is not at all prompted by a belief that a contrary rule would be undesirable. Convincing policy arguments can be marshalled for a more liberal transfer statute, although abuses can be imagined if the construction urged by Goldlawr were accepted, but these arguments should be made to the legislature. If after due consideration of such policies and of all competing views the broader transfer statute be thought to be desirable, a section which specifically provides for the procedural innovation might be favorably received by Congress. Any attempt by the courts to enact by their decisions so radical a procedural innovation, particularly where the effect of such decisions is to narrow the requirement of jurisdiction over the person, would invade legislative territory. See *Miner v. Atlass*, *supra*.

In passing, it is noted that even if the Pennsylvania District Court did have the authority under 28 U. S. C. 1406(a) to transfer the case in the absence of personal jurisdiction over the defendants, as we hold it did not, the

transfer might well have been defective as to defendant Heiman because he died prior to the attempted transfer and no administrator was appointed to represent him in this litigation until after the invalid transfer. See Fed. Rules of Civ. Pro. 25(a)(1); *United States v. Field*, C. C. S. D. N. Y., 1859, 25 Fed. Cas. 1067. Because the validity of the transfer as to all appellees is disposed of on other grounds, that matter need not be pursued.

As Judge Palmieri pointed out, the transferor court being unauthorized to order the transfer under section 1406(a), the only alternatives for the transferee court are to remand the case back to the transferor or to dismiss. Since it has already been determined that venue is improper in Pennsylvania, it would be a sterile gesture to remand the action to be transferred back to the District Court for the Eastern District of Pennsylvania.

The judgment below is affirmed.

HINCKS, *Circuit Judge* (dissenting in part):

I agree with my brothers that the order below as to Heiman should be affirmed. See *United States v. Field*, C. C. S. D. N. Y., 25 Fed. Cas. 1067.

But I would hold that the transfer was proper as to Select and United, notwithstanding the absence of effective personal service on them in Pennsylvania. It was so held in *Amerio Contact Plate Freezers v. Knowles*, D. C. Cir., 274 F. 2d 590, in an opinion which was entered after the opinion below. The court there said, in speaking of such a transfer, "The courts lack of jurisdiction over the person of the defendant is immaterial." This holding was followed in *Hayes v. Livermont*, D. C. Cir., 279 F. 2d 818. And in *Internatio-Rotterdam, Inc. v. Thomsen*, 4 Cir., 218 F. 2d 514, it was so held. To be sure, *Internatio* was an admiralty case and the appellees urge that its holding must be re-

stricted to admiralty cases. I do not agree. There the power of transfer prior to any service was held to be authorized under 28 U. S. C. § 1406(a). In speaking of a situation in which when the libel was filed neither a proper respondent nor property was within the transferor district but a vessel was expected shortly to appear, Judge Parker said:

> "When suit is so instituted, which has the effect of preserving the rights of libellant against the running of the statute, and the vessel does not appear in the district as anticipated but does appear or is expected to appear in another district, it seems clearly within both the letter and the spirit of 28 U. S. C. § 1406(a) to transfer the case, in the interest of justice, as having been brought in the wrong district, since the vessel cannot be served there and must be served before the case can proceed."

Often in actions at law the situation is not significantly different. When a complaint is filed in a particular district the complications of fact and uncertainties of law may be such that the plaintiff cannot be sure that venue or service of process in the district will be sustained (much as a libelant cannot be sure that an expected vessel will arrive in the district). When after long controversy it is adjudicated that the venue is improper, as was the case here, I think "the letter and spirit of 28 U. S. C. § 1406(a)" just as in the *Internatio* situation requires a transfer to a district in which venue can be properly laid and the defendant can be served. The policy underlying transfers in admiralty cases is equally applicable to actions at law. As Judge Parker, in *Internatio*, so well said:

> "Certainly such transfer is in accord with modern standards of procedure, the purpose of which is to get away from time-consuming and justice-defeating technicalities and secure an adjudication of the rights of

the parties by as direct and as expeditious a route as possible. The courts of the United States comprise one great system for the administration of justice."[1]

Numerous district court decisions reach the same result. *Orzulak v. Federal Commerce and Navigation Co.*, D. C. E. D. Pa., 168 F. Supp. 15; *United States v. Welch*, D. C. S. D. N. Y., 151 F. Supp. 899; *Petroleum Fin. Corp. v. Stone*, D. C. S. D. N. Y., 116 F. Supp. 426 (transfer under § 1404(a)); *Lumbermans Mut. Cas. Co. v. Mohr*, D. C. S. D. Texas, 87 F. Supp. 727; *Schiller v. Mit-Clip Co., Inc.*, D. C. S. D. N. Y., unreported, appeal dismissed 180 F. 2d 654.[2]

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1. I agree with the judge below and with my brothers that the decision of this court in *Schiller v. Mit-Clip*, 180 F. 2d 654, does not speak to the precise question now raised although other cases have given *Schiller* a more expansive reading. But after all, this court in *Schiller*, even if it did not pass upon the validity of a transfer made without personal jurisdiction, at least allowed such a transfer to stand.

2. Personal jurisdiction over the defendant was held at least by implication to be a prerequisite to a § 1406(a) transfer in *Independent Productions Corp. v. Loew's, Inc.*, D. C. S. D. N. Y., 148 F. Supp. 460, 467. See *Pistel v. Beaver Trust Co.*, D. C. S. D. N. Y., 94 F. Supp. 974 (unclear whether ruling based on 1406(a) or 1404(a)). Several cases have held personal jurisdiction a prerequisite to transfer under 1404(a), *McDaniel v. Drotman*, D. C. W. D. Ky., 103 F. Supp. 643; *Hargrove v. Louisville & N. R. R.*, D. C. W. D. Ky., 153 F. Supp. 681; *Wilson v. Kansas City So. Ry.*, D. C. W. D. Mo., 101 F. Supp. 36; *Scarmardo v. Mooring*, D. C. S. D. Tex., 89 F. Supp. 936; *In re Josephson*, 1 Cir., 218 F. 2d 174, 185 (not "in the interests of justice" to transfer under 1404(a) before transferor court obtains personal jurisdiction).

However, since 1404(a) is the statutory articulation of the doctrine of *forum non conveniens*, these cases may be based on the historical fact that that doctrine was not applicable "if there is absence of jurisdiction," *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 504. Moreover it may be noted that in 1404(a) cases the liberal objective of the doctrine will not be materially impaired by requiring personal jurisdiction as a prerequisite to transfer since in 1404(a) cases, unlike 1406(a) cases, venue is an indispensable prerequisite and hence personal jurisdiction except in occasional diversity cases can be easily obtained.

Whether personal jurisdiction is a prerequisite to transfer under 1404(a), is not now before us.

Since the requirements which support venue under § 12 of the Clayton Act and which support amenability to service of process whereby personal jurisdiction may ordinarily be obtained are so nearly the same, the appellant argues that seldom if ever would a plaintiff be privileged to invoke § 1406(a) against a corporate defendant in a private antitrust action if personal jurisdiction were a prerequisite. For in cases in which personal jurisdiction may be acquired by service within the district there would be no defect of venue; it is generally only when the defendant cannot be served within the district that venue would be defective. The appellees counter with the argument that under § 12 of the Clayton Act a defendant, even if not amenable to local service, may be subjected to the jurisdiction by extraterritorial service, so that personal jurisdiction may be obtained even when venue is improper. But if § 12 is available when venue is improper, the only ground upon which the appellees attack the transfer to the court below is gone. For prior to the transfer the appellant did make extraterritorial service on the appellees, as my brothers recognize.[3] The judge below, on the other hand, held that § 12 by its terms was available only in cases in which venue was proper (i.e., cases brought "not only in the judicial district whereof it [the defendant] is an inhabitant, but also in any district wherein it may be found or transacts business"). If this interpretation of § 12 be right, there is weight in the above-stated contention of the appellant that to read into § 1406(a) of the Code a requirement of personal jurisdiction, as in effect the appellees ask us to do, would go far to nullify the liberal objective of § 1406(a): it would then, if I may resort to an Irish bull, be available only when there was no occasion for its use. That interpretation of § 1406(a) I would think neither desirable nor required.

The appellees argue that my construction of § 1406(a) will invite its abuse. But I am not impressed by the pro-

3. See majority opinion, footnote 1.

cedural spectres which they conjure up to bolster this argument.[4] I do not suggest that a transfer by a court without personal jurisdiction will "cure" the jurisdictional defect; the defendants would still have to be properly served before their substantive rights could be affected. And in any event, if a plaintiff attempts to make improper use of the Act the court, "in the interests of justice," may refuse to order the transfer.

Certainly in this case no improper tactics seem to be present. The plaintiff for aught that appears had some reason for laying venue in Pennsylvania, its home state. After a substantial controversy it prevailed as to some defendants and failed as to others, including these appellees. Doubtless in bringing suits against all in Pennsylvania it was actuated by the hope of prosecuting its claim against all the defendants in one action in its home forum. There was nothing improper in that: indeed, the law frowns upon needless severance of trials and provides some flexibility to accommodate the convenience of litigants. Doubtless plaintiff was also actuated by a desire to hold the filing date of its complaint as marking the period for which damages would be recoverable: if compelled to serve the appellees anew in New York it would lose the right to recover for damages which had accrued in the earlier part of the statutory period under its original complaints. But this consideration, also, was completely consistent with its good faith: indeed, at least in the circumstances of this case, that factor might be considered as one in the interest of justice tending to support the transfer. *Per contra*, it would not have been a wise use of discretion to withhold the transfer merely to provide the appellees with immunity for part of the statutory period.

I think that considerations of procedural policy unite with the weight of precedent in support of the construction I have put on the Act. The only court of appeals de-

4. If there were substance to such spectres one would expect the appellees to refer to actual cases instead of to hypothetical cases only.

cision which supports my brothers is *Hohensee v. News Syndicate*, referred to in footnote 10 of the majority opinion. With deference, I can only say that that case, like the opinion of my brothers herein, wholly without Congressional sanction reads into § 1406 a restriction on a salutary procedural provision which is not there. And a careful reading of its Congressional history does not suggest to me that such a restriction was intended. I would hold that the transfer was made not only legally but also in a wise exercise of discretion.

APPENDIX B.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT.

KRAFT, *J.* December 22, 1958

Plaintiff commenced these two actions against substantially the same defendants under relevant provisions of the antitrust laws. The first action (21506) was commenced on October 17, 1956 and the second (22092) on February 18, 1957. The actions are essentially identical except that the second (a) added certain defendants, (b) sued several original defendants in additional capacities and (c) extended the period for which damages are sought. Now pending are numerous pre-trial motions which will be disposed of seriatim.

I. MOTIONS TO DISMISS FOR IMPROPER VENUE.

These motions were filed by all defendants in both actions except Barrymore Theatre Corporation (Barrymore) and Modern Theatre Corporation (Modern).[1] Disposition of these motions requires some analysis of the facts germane to two classes of defendants, i.e., individuals and corporations.

(a) INDIVIDUAL DEFENDANTS.

After granting a cause of action under the antitrust laws to anyone injured in his business or property, 15 U. S. C. A. § 15 lays the venue in such actions in ". . . any district court of the United States in the district in which the defendant resides or is found or has an agent, . . ." We reject defendants' contention that 28 U. S. C. A. § 1391(b), a general venue statute, applies. By its express

1. Modern and Barrymore are not defendants in 21506. Both filed answers in 22092.

terms § 1391(b) does not apply where a different law provides otherwise.[2]

Lawrence Shubert Lawrence (Lawrence) resided in this district and was properly sued here.

Plaintiff does not contest the averments in the remaining individual defendants' affidavits that each resided in New York and, since none of them was *found* here, we must determine whether any of them had *an agent* here.

Prior to 1914, venue in antitrust actions was laid in the district in which the defendant resided or was found.[3] The addition of the district in which defendant "has an agent" was a change made by the Clayton Act, which also enlarged prior venue provisions as to corporations by adding thereto the district in which a corporation transacts business.[4] In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927), the court construed the latter addition as one intended to broaden the concept of "found" in the earlier venue provisions. A corporation could thus be held to be transacting business, and venue established, "—although not present by its agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character."[5] To meet the test of "found" in the earlier venue provisions, *People's Tobacco Co., Ltd., v. American Tobacco Co.*, 246 U. S. 79, 84, 86 (1918) required the presence of agents carrying on business as described above.

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2. See Fourco Glass Co. v. Transmirra Products Corp., 353 U. S. 222, 228 (1957); Anderson-Friberg, Inc. v. Justin R. Clary & Son, Inc., 98 F. Supp. 75, 83 (S. D. N. Y. 1951); Lipp v. National Screen Service Corp., 95 F. Supp. 66, 70 (E. D. Pa. 1950).

3. Act of July 2, 1890, c. 647.

4. 15 U. S. C. A. § 22.

5. 273 U. S. at p. 373. See also, United States v. Scophony Corporation of America, 333 U. S. 795, 807 (1948) which reaffirmed this construction.

We believe "or has an agent" broadened the concept of "found" in the case of individual defendants, just as "transacts business" broadened the concept of "found" in the case of corporate defendants, although *Eastman* did not decide this question. The purpose of these two changes was to ". . . give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries."[6] The difference in the choice of words applicable to individual and corporate defendants was intended to avoid too broad a change which might have jeopardized passage of the entire bill.[7]

> "Thus, *strict* uniformity in the two sections' venue provisions was not achieved. But whatever their differences may be, *each addition was designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient,* enforcement of antitrust prohibitions."[8] (Emphasis supplied.)

From the affidavits filed by the parties it appears that both J. J. Shubert and John Shubert had the unquestioned right and power to control Lawrence and that each repeatedly exercised such right and power in directing Lawrence's business activities in this district. The extent of J. J. Shubert's exercise of control over Lawrence is somewhat surprising, in view of the latter's high position in the Shubert enterprises. J. J. Shubert ratified the orders of Lawrence for repairs to local theatres, authorized his vacations, negotiated contracts with local unions, arranged schedules for the lengths of runs in local theatres, and, in some instances, even personally inspected local theatres.[9]

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6. United States v. National City Lines, Inc., 334 U. S. 573, 583 (1948).

7. Id. at p. 585.

8 Id. at p. 586.

9. See exhibits 155 to 180 accompanying plaintiff's affidavit.

John Shubert, a defendant in 22092, exercised a like degree of control over Lawrence in the operation of local theatres. He instructed Lawrence on the changes to be made in contracts, on the changes of performances from one Philadelphia theatre to another, on the orders for tickets for performances, on increases and decreases in ticket prices, on price scales, advertising, and on other matters. It is difficult to conceive of a more scrupulous control than that exercised both by J. J. and by John Shubert over Lawrence in the business conduct of the local theatres. We find, therefore, that, as the term is defined at common law and under the more liberal intendment of antitrust cases, Lawrence was the agent of both Shuberts within the meaning of 15 U. S. C. A. § 15.[10] See *Riss & Company, Inc. v. The Association of Western Railways*, 159 F. Supp. 288, 293 (D. C. D. C. 1958).

The evidence does not persuade us, however, that any other of the moving individual defendants had an agent within this district.

Accordingly, the motions of Lawrence and J. J. Shubert in 21506 and 22092 and of John Shubert in 22092 will be denied. The motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heinman, individually, in each action, will be granted.

(b) Corporate Defendants.

United Booking Office, Inc. (U. B. O.), Select Theatres Corporation (Select Theatre), Select Operating Corporation (Select Operating), and L. A. B. Amusement Corporation (L. A. B.) are defendants in both actions. Barrymore Theatre Corporation (Barrymore) and Modern Theatre

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10. It may be noted, parenthetically, that the fact that J. J. and John Shubert may have been acting in their respective capacities as corporate officers does not mean that, for venue purposes, they had no agents here as individuals. See, United States ex rel. Marcus v. Hess, 41 F. Supp. 197, 211 (W. D. Pa. 1941). See also, 15 U. S. C. A. § 24.

Corporation (Modern) are defendants only in 22092. There are no motions before us by Barrymore or Modern or by L. A. B. which appears to have been dissolved on June 19, 1952. We have for consideration the motions of U. B. O., Select Theatre and Select Operating.

From the affidavits and accompanying exhibits filed by the parties it is evident that the material facts affecting the internal organization, the inter-corporate functions and dealings of the corporations are not matters of substantial dispute. It is upon the legal significance of those facts that disagreement exists. The complicated nature of the arrangements among these corporations necessitates a somewhat detailed discussion of the relevant facts.

Select Theatre was the parent corporation. All of its preferred and 90% of its common stock was owned by various members of the Shubert family. Select Theatre was the owner of all of the stock of Select Operating, Barrymore and Modern and was the owner of 50% of the stock of U. B. O., the other 50% of which was owned by Marcus Heiman, President of U. B. O.

The two wholly-owned local subsidiaries, Barrymore and Modern, ostensibly operated the Philadelphia theatres and were the only corporate defendants licensed to do business in Pennsylvania. Purportedly, Barrymore operated the Forrest Theatre and Modern the Walnut, Locust and Shubert Theatres. All the corporate defendants, except Modern, a Pennsylvania corporation, were incorporated in New York and had their offices there in the same building. U. B. O., Select Theatre and Select Operating were not licensed to do business in Pennsylvania and had no address, telephone listing or officers resident in that state.

Corporate separateness in accounting procedures was observed in the actual day to day operation of these enterprises. The treasurer of each Philadelphia theatre collected the receipts, deducted the local amusement tax and remitted the amount of the tax to Select Operating, which kept the books of all the corporations. Select Operating

deposited the tax remittance in a special account in New York to the sender's credit and issued its own check to the taxing authority for the respective account of Barrymore or Modern. The tax returns for the local corporations were prepared by Select Operating and forwarded with the remittances.

Each week the manager of each local theatre deposited the balance of the weekly receipts in a Philadelphia bank and issued a check to Select Operating for that amount. Customary payroll deductions, etc., were computed in Philadelphia and a check for such deductions was likewise issued to Select Operating. These were accumulated in New York and appropriate returns were prepared and payments made by Select Operating for Modern and Barrymore.

Defendant Lawrence was the general manager of the Philadelphia theatres and was ostensibly employed by Barrymore and Modern. Each of these corporations sent its proportionate share of Lawrence's salary to Select Operating in New York and the latter issued its own check in payment of his salary. Both Barrymore and Modern contributed to the operational cost of Select Operating and also paid it a "home office fee" for "executive and management services".

Shows were booked in New York through the services of Select Operating or U. B. O. This entailed agreements for the use by producers of designated theatres on specific dates. The terms of each booking agreement were embodied in a written contract signed by the producer and either Barrymore or Modern as the case might be. Either J. J. Shubert or John Shubert executed the contract as an officer of Barrymore or Modern.

Select Operating also executed blanket contracts for concessions in all four Philadelphia theatres and the amounts received therefrom were apportioned on its books between the corporate operators of the local theatres.

The foregoing facts which appear in defendants' affidavits indicate clearly that in accounting procedures, at

least, corporate separateness was carefully observed. In the exhibits accompanying plaintiff's affidavit, however, are strong indications that, in other respects, corporate separateness was not so meticulously adhered to.

Excerpts from the minute books of Select Theatre show that the corporate existence of Barrymore and Modern was largely discretionary with the parent. Correspondence between Select Theatre and Philadelphia, signed by J. J. Shubert and others on Select Theatre stationery, evidences a close control by Select Theatre of the minutiae of day to day operating procedures. The insurer of the local theatres addressed all correspondence to Select Theatre. Documents relating to the opening of a local bank account by a subsidiary were sent to Philadelphia by Select Theatre. Office materials such as stationery, ticket envelopes, etc., for Barrymore and Modern were supplied by Select Theatre. The advertising of the four local theatres was consolidated. Each theatre used its facilities to advertise plays presented at the others.

Select Theatre sent to Philadelphia "termination of contract notices" to be signed by local employees. J. J. Shubert for Select Theatre was kept carefully advised of the status of contracts with musicians in Philadelphia and other cities. Select Theatre instructed local managers about obtaining discounts for advertising in Philadelphia papers, about excessive expenditures for telephone calls and requested weekly reports on the operation of the local theatres.

Although bookkeeping seems to have been the major function of Select Operating, it was also the center from which supplies were sent to the Philadelphia theatres. Employment records and copies of contracts for shows were also kept by Select Operating.

U. B. O. booked shows for the Philadelphia theatres and determined the booking dates. It negotiated the terms of the contracts with the producers. Inquiries by private parties about the use of the Philadelphia theatres were referred to U. B. O.

In the case of corporations the test for venue under the antitrust law is, as we have said, whether the corporation is an inhabitant of, is found in or transacts business in the district in which suit is brought.

None of the three moving corporate defendants was an inhabitant of this district. The tests which determine whether a corporation is "found" within the district are narrower in scope than those which determine whether it "transacts business" therein. We shall, therefore, determine whether any of the moving corporate defendants transacted business in this district."[11]

We decline to adopt the plaintiff's theory that the allegation of conspiracy in the complaint constitutes Barrymore or Modern or both, as alleged co-conspirators, the agent or agents of the movant corporate defendants for venue purposes under the Clayton Act in any district where Barrymore or Modern is amenable to suit. Several cases have so held,[12] in purported reliance on *Giusti v. Pyrotechnic Industries, Inc.*, 156 F. 2d 351 (9th Cir. 1946), but we incline to the reasoning in two recent cases which conclude that it is doubtful that *Giusti* so held or that this is the law in any circuit."[13]

It is next urged that venue can be laid in this district on the ground that Select Theatre, Select Operating and U. B. O. were themselves transacting business here or were doing so through the agency of Barrymore and/or Modern, the wholly-owned subsidiaries of Select Theatre. The evi-

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11. Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U. S. 359 (1927).

12. Bliss & Company, Inc. v. The Association of Western Railways, 139 F. Supp. 288, 295, 296 (D. C. D. C. 1956); De Golia v. Twentieth Century-Fox Film Corp., 140 F. Supp. 316 (N. D. Cal. 1953); Ross-Hart Port Theatre, Inc. v. Eagle Lion Films, Inc., 140 F. Supp. 401 (E. D. Va. 1954); Don George, Inc. v. Paramount Pictures, Inc., 111 F. Supp. 458 (W. D. La. 1951).

13. Bertha Building Corp. v. National Theatres Corp., 248 F. 2d 833, 836 (2d Cir. 1957); Independent Productions Corp. v. Loew's, Inc., 148 F. Supp. 460 (S. D. N. Y. 1957). See also, Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784 (S. D. N. Y. 1936).

dence fails to persuade us that these corporations were themselves doing business here. We consider, then, whether the transaction of business here by Barrymore and Modern is sufficient, under the circumstances, to warrant holding that their parent, Select Theatre, did so.

We are mindful that the Supreme Court has held that, as long as corporate separateness is strictly maintained, service of process on a wholly-owned subsidiary does not subject the parent corporation to the court's jurisdiction, even though the purpose of incorporating the subsidiary was to avoid subjection of the parent to such jurisdiction. *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U. S. 333 (1925). We are also aware that in several anti-trust cases the standard of *Cannon* has been adopted in determining questions of venue. However, *Cannon* itself deemed the rule inapplicable where *an affirmative ground is shown for treating the subsidiary as an agent of the parent*, and antitrust cases have recognized the limitation.[14]

In the present case an affirmative ground has been shown, we think, for treating Barrymore and Modern as local agents of their parent, Select Theatre, for the same reasons which impel us to hold Lawrence, individually, to be an agent of J. J. and John Shubert. The Shuberts, in their right and power to control Lawrence, as well as in their exercise of that right and power, were acting both as corporate officers and as individuals and, on many occasions, in such fashion as to make inseparable the capacity in which, respectively, they acted. Thus, as officers of the parent corporation, they had the right and power to and did control the acts of Lawrence, as an executive employee of the two local subsidiaries.

In *Waldron v. British Petroleum Co., Ltd.*, 140 F. Supp. 830 (S. D. N. Y. 1957), a case remarkably similar to this, the court held a foreign parent to be transacting business in the forum by reason of the activities of its wholly-owned

14. United States v. The Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40, 45 (S. D. N. Y. 1955).

subsidiaries there. In that case a foreign corporation maintained two wholly-owned subsidiaries in the Southern District of New York, at least one of which attempted to preserve technical separateness from its parent. The court, noting the active interrelation between parent and subsidiary in other respects, held as we have indicated. Certain language in the court's opinion in that case appears particularly apropos here and we quote it *in extenso:*

> "A person would have to be blind to the economic facts of business life if he did not recognize that the activities of [the subsidiaries] in this District are activities which in another less elaborate corporate set-up would be conducted directly by branch offices or agents within the District. It is Socal, and not the subsidiaries, which is the defendant in the present action. What is Socal? It is a large aggregation of invested capital which transacts its business through officers, agents, employees, and through subsidiaries, which in the drilling, production and marketing of oil operate as agents, employees or branch offices would operate. *Does the fact that this large business entity, for tax reasons or otherwise, decides to fragmentize its operations into numerous corporate subsidiaries, make the resulting operations of the subsidiaries any the less a part of transaction of business by Socal?*" (p. 834) (Emphasis supplied).
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> * * *
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> "A corporation may be a fiction of the law but there is no reason to carry the fiction to the extreme of saying that a corporation which has wholly owned subsidiaries performing services in the local jurisdiction which ordinarily would be performed by service employees, or making sales which ordinarily would be made by a sales department, is in fact not transacting business in that jurisdiction, *particularly when the entire corporate set-up of the defendant shows that it is designed to operate to a substantial degree through*

separate corporate entities responding to the wishes and directions of the parent and providing the revenues sought by the parent. We would be exalting fiction over fact if we were to conclude that under those circumstances the parent company was not in fact transacting business in this District through the instrumentality of its wholly owned subsidiaries." (p. 835) (Emphasis supplied).

The applicability of this language to the facts before us is clear. Lawrence, through Barrymore and Modern, conducted the actual operations, but only subject to the controlling directions of Select Theatre, acting through the Shuberts. Cf. *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 134 F. Supp. 710, 712 (S. D. N. Y. 1955).

We consider, next, whether the transaction of business here by Barrymore and Modern is sufficient, under the circumstances, to warrant holding that Select Operating or U. B. O. did so.

Select Operating owned no stock of Barrymore or Modern. All of Select Operating's stock was owned by Select Theatre. Select Operating cannot be held to have transacted business here by reason of the activities of its wholly-owned subsidiaries because Barrymore and Modern were wholly-owned subsidiaries of Select Theatre, not of Select Operating.

The evidence persuades us that the principal function of Select Operating was to provide a central bookkeeping system and service department for the enterprises which Select Theatre owned or controlled, among them Barrymore and Modern. Select Theatre was the principal and Select Operating its agent. Neither Barrymore nor Modern was agent for Select Operating; to the contrary, Select Operating was, for certain purposes, their agent under the control and direction of their common principal, Select Theatre. The business transacted here by Barrymore and Modern

was under the control and direction and for the benefit of Select Theatre, not Select Operating.

U. B. O. owned no stock of Barrymore or Modern. Half of U. B. O.'s stock was owned by Select Theatre and half by Marcus Heiman. U. B. O. cannot be held to have transacted business here by reason of the activities of its wholly-owned subsidiaries because Barrymore and Modern were wholly owned subsidiaries of Select Theatre, not of U. B. O.

The evidence persuades us that the principal function of U. B. O. was to serve as an intermediary and clearing house between theatrical producers and theatre owners including, but not limited to, Select Theatre and its subsidiaries. Select Theatre was one of the principals for which U. B. O. functioned as broker or agent. Neither Barrymore nor Modern was agent for U. B. O.; to the contrary, U. B. O. was, for booking purposes, their broker or agent under the control and direction of Select Theatre. The business which Barrymore and Modern transacted here was under the control and direction and for the benefit of Select Theatre, not U. B. O. The latter's apparent power to fix price scales for Barrymore and Modern was a power in fact exercised by Select Theatre through John Shubert, though on U. B. O. sationery, and was not a power possessed by U. B. O.

Defendants place great reliance upon *Pfeiffer v. United Booking Office, Inc.*, 93 F. Supp. 363 (N. D. Ill. 1950) in which the court granted a motion to dismiss made by the same three defendants upon the same grounds which they here advance. However, we think that *Pfeiffer* is, in part, distinguishable from the present case principally because the interrelations between parent and subsidiaries are more fully revealed here than there.

As to Select Theatre, which owned all the stock of the local Chicago corporation, that court found that the separation between parent and subsidiary was "real". The conclusion was that correspondence between named employees of Select Theatre and the Chicago manager did not show that Select Theatre had any authority over the local man-

ager. As indicated by what we have said heretofore, such a conclusion could not be fairly drawn here from the correspondence between J. J. Shubert and Lawrence.

It is of interest to note that in *Waldron*, supra, there was a like claim by the parent that *two* prior cases against the same defendants had been decided favorably to the parent corporation upon its motions to dismiss for lack of venue. The court, in *Waldron*, pointed out that the *Scophony* ruling was made after the decisions in those cases and stated: "It is doubtful if a court today, guided as it must be by these later opinions of the United States Supreme Court, could reach the same conclusion as Judge Bright did in the Universal Oil Products case" (pp. 835, 836). The latter case, referred to by the court in *Waldron*, was *Winkler-Koch Engineering Co. v. Universal Oil Products Co.*, 70 F. Supp. 77 (S. D. N. Y. 1946), which was the only case relied on by *Pfeiffer*.

The motion of Select Theatre will, therefore, be denied and the motions of Select Operating and U. B. O. will be granted.

II. Motions to Quash Service and Dismiss the Action for Lack of Jurisdiction Over the Person.

A. Fiduciary Defendants.

These motions have been filed, inter alia, on behalf of the fiduciary defendants in both actions, i.e., Lawrence, Milton Shubert, William Klein and Sylvia W. Golde as *trustees* of the estate of Lee Shubert, deceased. The basis of the motions is that the fiduciaries act under the authority of the state of New York, are not amenable to and have not consented to suit in this district.

The unimpeached affidavits of these fiduciary defendants establish that they have not been designated or qualified as fiduciaries in any state other than New York; that they have not consented to suit in any other state; that they

have not received or administered any assets of the estate; that the trusts of which they are trustees have not been established; that they have not, as trustees, engaged in or transacted any business in Pennsylvania; that no assets of the estate are within this district; that there is no office of the estate within this district.

Lacking any affirmative statement or brief on this subject from the plaintiff, our independent investigation fails to reveal any ground upon which jurisdiction over these fiduciaries can be sustained. Under F. R. Civ. P. 17(b) the capacity of an individual acting in a representative capacity to be sued is determined by the law of the state in which the district court is held. If these fiduciaries lack capacity to be sued in Pennsylvania this court is without jurisdiction.

The general rule at common law is that a foreign personal representative may not be sued on a claim against the decedent's estate in a jurisdiction other than that of his appointment. Although Pennsylvania would appear at first glance to differ, we believe that close analysis of the cases supports the conclusion that, despite an apparent difference, a foreign representative may be sued in Pennsylvania only if there are assets of the estate present there.

In the leading case of *Laughlin & McManus v. Solomon*, 180 Pa. 177 (1897) a Delaware executor was served in Pennsylvania in an action upon a note. The trial court sustained the defendant's demurrer to the complaint and the Supreme Court reversed. Plaintiff-appellant contended that it could not be assumed in the pleading stage that the executor had no assets of the estate within the state and that evidence might establish the presence of assets within the state when the decedent died or the presence of assets thereafter brought into the state by the executor, in either of which instances the action was maintainable. In apparent acceptance of plaintiff's argument the court distinguished *Magraw v. Irwin*, 87 Pa. 139 (1878) and declared that case to be in harmony with Pennsylvania law. In *Magraw* the only assets of the estate ever within Pennsylvania were with-

drawn by the executrix after they had been awarded to her as legatee. After her death a foreign administrator c.t.a. was appointed and, having entered the state, was sued. The court held that the succeeding administrator could not be charged in Pennsylvania with assets which had been administered and distributed and that no jurisdiction over the fiduciary was acquired. Of *Magraw* the Laughlin case said (p. 183):

> "The decision therefore goes no further than the principle . . ., that an administrator is not chargeable with assets in another state which have never been within his control. . . ."

In the present case the only available evidence is that the fiduciaries have no assets here and are not present in a fiduciary capacity. See, *Independent Productions Corp. v. Loew's, Inc.*, 148 F. Supp. 460, 462 (S. D. N. Y. 1957).

In *Laughlin* there was no evidence of the presence or absence of assets. In *Magraw*, it was established upon trial that there were no assets within the jurisdiction. We conclude then that, under Pennsylvania law, where it affirmatively appears that no assets of a foreign estate are present in the forum no jurisdiction is acquired over the foreign representatives of the estate. This Circuit has interpreted the *Laughlin* case as authorizing local suits against foreign representatives only ". . . where claims to property within the jurisdiction of the court are involved." *Callwood v. The Virgin Islands National Bank*, 221 F. 2d 770, 778 (3rd Cir. 1955).

The motions of the fiduciary defendants will accordingly be granted.

B. Individual and Corporate Defendants.

We consider next the motions of J. J. Shubert, John Shubert and Select Theatre as to whom we have concluded venue was proper.

15 U. S. C. A. § 22, after laying the venue against corporations in antitrust actions provides that ". . . all

process in such cases may be served in the district of which it [the corporation] is an inhabitant or wherever it may be found." Once venue is properly established it appears that a defendant corporation may be served at either place designated by the statute, even though those places are outside the district in which suit has been brought.[15]

Extra-territorial service upon Select Theatre in each action was by alias summons in New York where that defendant admittedly had its principal office. This service was proper.[16]

By the provisions of F. R. Civ. P. 4(d)(7) service upon J. J. Shubert and John Shubert was authorized ". . . in the manner prescribed . . . by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." In Pennsylvania, Pa. R. Civ. P. 1009(b)(2)(iii) authorizes service upon individuals by handing a copy of the summons or complaint "at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof."

In 21506 J. J. Shubert was purportedly served by leaving a copy of the summons and complaint at 209 Quince Street, Philadelphia "on the desk of woman in charge who refused to give her name or title." In 22092 service was purportedly effected by J. J. Shubert and John Shubert by leaving copies of the summons and complaint at the same address with "Mrs. C. E. Richman woman in charge of

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15. Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U. S. 359, 373 (1927); Pfeiffer v. United Booking Office, 93 F. Supp. 363, 364-65 (N. D. Ill. 1950); Sure-Fit Products Co. v. Fry Products, Inc., 23 F. Supp. 610, 612 (S. D. N. Y. 1938); Katz Drug Co. v. W. A. Sheaffer Pen Co., 6 F. Supp. 210, 212 (W. D. Mo. 1932).

16. Waldron v. British Petroleum Co., Ltd., 149 F. Supp. 830, 836 (S. D. N. Y. 1957) upheld a similar service in a similar situation. In each action an alias summons was served on Select Theatre by leaving a copy of the complaint and summons with J. J. Shubert, its president, at the corporate office, 236 W. 44th St., New York City.

Forrest Theatre place of business designated by plaintiff's attorney for service on defendant."

From the affidavits filed by counsel it appears unchallenged that 209 Quince Street is the local office or usual place of business of Barrymore and Modern and that both J. J. Shubert and John Shubert are officers of these corporations.

The rule in this district following the Pennsylvania law, is that the Marshal's return is conclusive and cannot be attacked as false in fact,[17] so that we accept as a fact that the person to whom the copies of the summons and complaint were handed was for the time being in charge of the office at 209 Quince Street.

In *Wylie v. McKnight*, 10 Beaver C. L. J. 145, 153 (Pa. Comm. Pl. 1948) service upon individual defendants by leaving copies of the complaint at the office of a corporation of which they were officers and directors was sustained despite the fact that the defendants lived and transacted their business in a different county.[18] Upon the authority of *Wylie*, and in view of the fact that the purpose of service is to insure that a defendant will receive actual knowledge of the commencement of the action against him, we conclude that the manner of service upon the two individual defendants was proper.

The motions of Select Theatre and J. J. Shubert in each action will be denied and the motion of John Shubert in 22092 will be denied.

III. Motions for Summary Judgment.

Civil Action 22092 was commenced on February 18, 1957. In that action the defendants Barrymore, Modern

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17. Woods v. Zellers, 9 F. R. D. 6 (E. D. Pa. 1949). *Accord:* Hicklin v. Edwards, 226 F. 2d 410 (8th Cir. 1955). *Contra:* Metropolitan Theatre Co. v. Warner Bros. Pictures, 16 F. R. D. 391 (S. D. N. Y. 1954); Puett Electrical Starting Gate Corp. v. Thistle Down Co., 2 F. R. D. 550 (N. D. Ohio 1942).

18. See also, Messing v. Messing, 84 D. & C. 367, 375 (Pa. Comm. Pl. 1952).

and Lawrence have moved for summary judgment under F. R. Civ. P. 56 on the ground that any cause of action arising prior to February 18, 1953 is barred by the applicable statute of limitations, 15 U. S. C. A. § 15(b) (Supp. 1957). Plaintiff contends, however, that the statute of limitations was tolled as to the moving parties by reason of 15 U. S. C. A. § 16(b) (Supp. 1957) because an antitrust action, which terminated in a consent judgment, was commenced against the Shubert interests on February 21, 1950.

The motions of Barrymore, Modern and Lawrence in 22092 will be denied without prejudice to their rights to assert the statute of limitations as a defense, in whole or in part, in their responsive pleadings.

IV. Plaintiff's Motion for Leave to File an Amended Complaint.

Plaintiff has filed this motion in 21506 for the sole purpose of extending to September 1, 1950 the period during which the acts in the original complaint are alleged to have occurred. In other respects the amended complaint is essentially identical with the original and, in its proposed form, is substantially identical with the complaint in 22092.

The defendants in 21506, other than Lawrence, have not filed or served responsive pleadings and, as to them, the plaintiff may amend its complaint as of course. That a responsive pleading was served by one defendant, Lawrence does not alter this result.[19]

Leave to amend the complaint against Lawrence will be granted without prejudice to his right to assert in his responsive pleading the defenses raised in his motion for summary judgment.

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19. F. R. Civ. P. 15(a); see Ginsburg v. Stern, 19 F. R. D. 238, 241 (W. D. Pa. 1956) *order aff'd in part*, 242 F. 2d 379 (3rd Cir. 1957); cert. denied, 26 L. W. 3298; Peckham v. Scanlon, 241 F. 2d 761, 764 (7th Cir. 1957); Simmons v. Cantor, 3 F. R. D. 197 (W. D. Pa. 1943); Pallant v. Sinatra, 8 Fed. Rules Serv. 15a.11, Case 1 (S. D. N. Y. 1945).

V. Motions to Vacate Ex Parte Order Permitting Joinder of Third Party Defendants and to Discuss the Third Party Complaint.

The essence of the third party complaint in each action is that William Goldman and William Goldman Theatres, Inc., predecessors to plaintiff as lessee of the Erlanger Theatre, conspired with each other to abandon efforts to secure first-run motion pictures for the Erlanger, a function to which that theatre is allegedly better suited. It is alleged that the object of this conspiracy was to afford other theatres operated by William Goldman Theatres, Inc. a competitive advantage over the Erlanger to eliminate it from competition with the other theatres in violation of the antitrust laws. It is further alleged that William Goldman is president and controls the third party corporate defendant.

This complaint states no claim upon which relief can be granted. It has been decided that a corporation may not conspire with itself, i.e., with its officers, agents and employees. *Nelson Radio and Supply Co., Inc. v. Motorola, Inc.*, 200 F. 2d 911, 914 (5th Cir. 1952).[20]

These motions will be granted.

VI. Motions to Strike Paragraphs 9 and 10 From the Complaints.

Each of the remaining defendants has moved in each action to strike from the complaint paragraphs 9 and 10 upon the grounds that they are irrelevant to any injury allegedly incurred by the plaintiff and are scandalous.

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20. See also, Packaged Programs, Inc. v. Westinghouse Broadcasting Company, Inc., 156 F. Supp. 76, 78 (W. D. Pa. 1957); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 153 F. Supp. 684, 686 (N. D. Ill. 1957); Herren Candy Co. v. The Curtis Candy Co., 153 F. Supp. 751, 755 (N. D. Ga. 1957); Beacon Fruit & Produce Co., Inc. v. H. Harris & Co., Inc., 152 F. Supp. 702, 704 (D. Mass. 1957); Sperry Rand Corp. v. Nassau Research and Development Associates, Inc., 152 F. Supp. 91, 93 (E. D. N. Y. 1957); J. H. Whiteley v. Foremost Dairies, Inc., 151 F. Supp. 914, 923 (W. D. Ark. 1957).

In each complaint these paragraphs allege, in substance, that as a result of defendants' exclusion of the plaintiff from the presentation of theatrical productions, the defendants have conspired with divers persons to restrain the sale of tickets at regular prices at the ticket offices of their respective theatres in order to oblige prospective patrons to buy tickets from brokers and "ticket scalpers" at prices which exceed the established theatre prices; further, that the defendants have thus been enabled to charge and have charged higher prices for tickets than they would otherwise have been able to charge had they not enjoyed a monopoly—all to the detriment of the public and patrons.

In paragraphs 14 and 16 of the complaints plaintiff alleges that it will be unable to obtain legitimate attractions and has suffered specific pecuniary damage. The prayers for relief demand treble damages, injunctions against interference with plaintiff's right to present theatre attractions and against defendants' alleged unlawful refusal to negotiate for such attractions.

The court is authorized by F. R. Civ. P. Rule 12(f) to order stricken from any pleading, upon motion, matter which is redundant, immaterial, impertinent, or scandalous. In *Slick Airways, Inc. v. American Airlines, Inc.*, 15 F. R. D. 175 (1954) Judge Forman aptly expressed the philosophy which this court's experience with antitrust actions leads us to believe should control:

> ". . . pleadings should not be whittled away where the material averred, while not strictly within a rigid interpretation of the rules, is helpful in outlining the background against which the action is laid, particularly where those allegations are factual and will not impose hardship upon the adverse party to answer or otherwise prejudice him. It is equally obvious that . . . the injection of issues remote from the claim of the plaintiff can serve to lead into tributaries away from the main stream of litigation frustrating the pur-

pose to reduce it to its simplest terms and avert unnecessary expenditures of large amounts of time, money and effort, usual concomitants of court controversies even when most expeditiously administered." (pp. 177-178).

For the reasons hereinafter stated we conclude that paragraphs 9 and 10 are remote from and immaterial to the claim of the plaintiff and should be stricken.

Treble damage actions are authorized to be commenced by persons *injured in their business or property* for the damages sustained by them.[21] A complaint in a private civil antitrust action may not allege a violation of the statute and, *ipso facto*, claim damages generally. Specific injury suffered by the plaintiff, differing from that sustained by the plaintiff as a member of the public, must be affirmatively alleged.[22]

The gist of the present complaints is that the defendants conspired to deprive the plaintiff of legitimate theatre attractions with resultant special damage to the plaintiff's business and injury to the public. The plaintiff seeks monetary and injunctive relief. It appears to us that paragraphs 9 and 10 allege a wholly different conspiracy without any affirmative allegation of consequent injury to the plaintiff's business. To the contrary the injury alleged is to the public. If such a conspiracy affecting the public interest does exist the party to take appropriate action under the antitrust laws in the public interest is the Attorney General, not the plaintiff. *Bogle* v. *Thomson*, 138 F. 2d 675 (7th Cir. 1943) precludes the plaintiff's self-appointment as the pub-

21. 15 U. S. C. A. § 15.

22. Bogle v. Thomson, 138 F. 2d 675, 681 (7th Cir. 1943); Revere Camera Co. v. Eastman Kodak Co., 81 F. Supp. 325, 330-331 (N. D. Ill. 1948); Schwartz v. General Electric Co., 107 F. Supp. 58 (S. D. N. Y. 1952); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 80 F. Supp. 899, 905-906 (D. Del. 1948); Caldwell-Clements, Inc. v. McGraw-Hill Publ. Co., Inc., 12 F. R. D. 403, 405 (S. D. N. Y. 1952).

lic's officer to end the alleged ticket selling conspiracy and to punish the alleged conspirators.

In oral argument plaintiff's counsel strongly urged that this conspiracy discouraged people from attending theatres. The complaints contain no such allegation and the contention of counsel is insufficient to show the "manner, nature, character and extent of the injury sustained" by the plaintiff or specific facts upon which damages might be assessed. *Beegle, supra*, p. 881.

The motions to strike will be granted. Counsel will settle and submit orders accordingly.

/s/ C. William Kraft,

J.

ORDER.

(E. D. Pa. No. 21,506)

(Rec. page 647)

Now, the 3rd day of March, 1959, upon consideration of the plaintiff's motion to transfer, conformably to 28 U. S. C. A. § 1406(a), filed January 20, 1959, the court finds it to be in the interest of justice to transfer to the United States District Court for the Southern District of New York this case against the following defendants: Select Operating Corporation, United Booking Office, Inc., Marcus Heiman, Milton Shubert, William Klein and Sylvia W. Golde, as individuals, and such transfer to the United States District Court for the Southern District of New York is now ordered.

It is further ordered that the motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, as individuals, and of Select Operating Corporation and United Booking Office, Inc. to dismiss for improper venue be and are denied.

/s/ C. William Kraft, Jr.,
United States District Judge.

ORDER OF TRANSFER BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Now, the 3rd day of March, 1959, upon consideration of the plaintiff's motion to transfer, conformably to 28 U. S. C. A. § 1406(a), filed January 20, 1959, the court finds it to be in the interest of justice to transfer to the United States District Court for the Southern District of New York this case against the following defendants: Select Operating Corporation, United Booking Office, Inc., Marcus Heiman, Milton Shubert, William Klein and Sylvia W. Golde, as individuals, and such transfer to the United States District Court for the Southern District of New York is now ordered.

It is further ordered that the motions of Milton Shubert, William Klein, Sylvia W. Golde and Marcus Heiman, as individuals, and of Select Operating Corporation and United Booking Office, Inc. to dismiss for improper venue be and are denied.

/s/ C. WILLIAM KRAFT, JR.,
United States District Judge.

APPENDIX C.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

PALMIERI, *J.*

This is an antitrust action originally instituted on October 17, 1956 by plaintiff against various persons and corporations in the Federal District Court for the Eastern District of Pennsylvania. That Court retained the action as to defendants found to be properly before it and, on March 3, 1959, ordered the action transferred to this Court as to the above-named defendants for lack of proper venue in Pennsylvania. Motions filed here by defendants subsequent to transfer will be discussed seriatim.

I.

Motion of Defendants Select Operating Corporation and United Booking Office, Inc. to Dismiss for Lack of Jurisdiction.

Select Operating Corporation and United Booking Office, Inc. are incorporated and have their offices in New York. Plaintiff, claiming the right to extraterritorial process under Section 12 of the Clayton Act, 38 Stat. 736 (1914), 15 U. S. C. § 22 (1958), served these defendants in New York, by alias summons, in February and March of 1957. Defendants immediately moved to quash the returns of service of the summons and to dismiss for lack of jurisdiction and improper venue. In an opinion dated December 22, 1958, 169 F. Supp. 677, the Court in Pennsylvania held that venue was improper, finding that defendants were not inhabitants of or found in Pennsylvania, and did not transact business there as required by Section 12 of the Clayton Act. Transfer was ordered without ruling upon the motions to dismiss for lack of personal jurisdiction.

Service of the alias summons was the only service of process ever received by either defendant in this District. Therefore, the first question presented is whether, under Section 12 of the Clayton Act, the extraterritorial service of process while the action was pending in Pennsylvania had the effect of giving this Court, on transfer, personal jurisdiction over the defendants.

Section 12 provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

If the service purported to be made under this section was effective to give the Court in Pennsylvania personal jurisdiction, such jurisdiction would continue after transfer. See Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949). In order to sustain jurisdiction in Pennsylvania, however, the clause of Section 12 dealing with process would have to be read as wholly independent of the clause dealing with venue. If so read, the extraterritorial service would give the Court in Pennsylvania jurisdiction; the only defect would be improper venue. *Petroleum Financial Corp. v. Stone*, 116 F. Supp. 426, 428 (S. D. N. Y. 1953) (dictum), Note, 38 Minn. L. Rev. 874 (1954).

The language of the section itself precludes the interpretation set forth above. By the phrase "all process in *such cases*" (emphasis supplied), the privilege of extraterritorial service is expressly confined to actions brought in a district in which the corporation is an inhabitant, found, or transacting business. *Dazian's Inc. v. Switzer Bros.*, 111 F. Supp. 648 (N. D. Ohio 1951); *Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n*, 102 F. Supp. 649 (D. Minn. 1951); *Reid v. University of Minnesota*, 107 F.

Supp. 439 (N. D. Ohio 1952); *cf. Greenberg v. Giannini*, 140 F. 2d 550 (2d Cir. 1944); *Lavin v. Lavin*, 182 F. 2d 870, 873 (2d Cir. 1950) (dictum). That the Pennsylvania forum is not such a District is no longer in dispute. Therefore plaintiff cannot invoke Section 12 of the Clayton Act to legitimatize the extraterritorial service. The Court in Pennsylvania never acquired personal jurisdiction over the defendants, and this Court did not acquire personal jurisdiction as a result of the transfer.

Nor was personal jurisdiction obtained in this District by virtue of the fact that the alias summons was delivered in New York. Service made without statutory authority is of no effect regardless of actual notice to defendants. *Cf. Wuchter v. Pizzuti*, 276 U. S. 13 (1928).

This Court now lacks personal jurisdiction over the defendants since effective service of process has never been accomplished. However, if the transfer to this District were authorized, plaintiff might still be in a position to avoid dismissal by making proper service upon defendants without further delay. See *UNRRA v. The Mormadpine*, 99 F. Supp. 552 (S. D. N. Y. 1951); 5 Moore, Federal Practice § 41.11 at p. 1039 (2d ed. 1951). Therefore, the second question to be determined on this motion is whether a Court, lacking jurisdiction over defendants, may nonetheless transfer the action to a District where service can be effected.

This issue, requiring interpretation of the transfer provisions of the Judicial Code, 28 U. S. C. §§ 1404(a), 1406(a) (1952), is one on which the Courts are in disagreement. *Independent Productions Corp. v. Loew's, Inc.*, 148 F. Supp. 460 (S. D. N. Y. 1957); *McDaniel v. Drotman*, 103 F. Supp. 643 (W. D. Ky. 1952); *Wilson v. Kansas City So. Ry.*, 101 F. Supp. 56 (W. D. Mo. 1951); *Fistel v. Beaver Trust Co.*, 94 F. Supp. 974 (S. D. N. Y. 1950) (transfer may be made only by a court which has personal jurisdiction). *International-Rotterdam, Inc. v. Thomsen*, 218 F. 2d 514 (4th Cir.), 68 Harv. L. Rev. 1069 (1955) (admiralty); *Orzulak v. Federal Commerce and Navigation Co.*, 168 F. Supp. 15 (E. D.

Pa. 1958) (admiralty); *United States v. Welch*, 151 F. Supp. 899 (S. D. N. Y. 1957); *Petroleum Financial Corp. v. Stone*, 116 F. Supp. 426 (S. D. N. Y. 1953); *Lumbermens Mut. Cas. Co. v. Mohr*, 87 F. Supp. 727 (S. D. Texas 1949) (transfer may be made by a court which lacks personal jurisdiction). Section 1406(a), authorizing transfer when venue is improperly laid, provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Section 1404(a), since it applies when venue is proper but the forum in which the action is brought is inconvenient, is not directly involved in this action. It is appropriate to note, however, that the Courts have not drawn a distinction between the two sections in regard to the propriety of transfer by a Court which lacks jurisdiction. *E.g., Petroleum Financial Corp. v. Stone, supra*, 42 Geo. L. J. 315, 318 (1954).

This Court is of the view that Section 1406(a), which by its terms speaks to defective venue only, cannot be made to do service when there is also a jurisdictional defect. Proper jurisdiction is the more basic requirement. See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167-168 (1939). The drafters of the Judicial Code made an express provision for transfer in the event of improper venue. They made no express provision for transfer in the event of lack of jurisdiction. It is unlikely that the drafters relied upon a venue section to carry along an implicit provision for transfer to cure a jurisdictional defect. See Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949); Notes 38 Minn. L. Rev. 874, 23 U. Cinn. L. Rev. 357, 359 (1954).

It should be noted that *Schiller v. Mit-Clip Co.*, 180 F. 2d 654 (2d Cir. 1950), which has been cited as authority for the propriety of transfer when jurisdiction *in personam*

could not be had in the transferor forum, *United States v. Welch*, 151 F. Supp. 899 (S. D. N. Y. 1957); *Petroleum Financial Corp. v. Stone, supra;* 68 Harv. L. Rev. 1069, 1070 (1955), never reached the question. In that case plaintiff resisted and defendant argued in support of transfer. The Court of Appeals, in denying plaintiff's petition for a mandamus to compel the district judge to revoke the transfer order, stated: ". . . [T]he plaintiff cannot complain because he has not suffered the dismissal which he so richly deserved. . . . Whether we should have any jurisdiction, either by appeal or by mandamus, to review such an order, we need not decide." 180 F. 2d at 655.

On the reasoning set forth above it is concluded that the Court in Pennsylvania improperly transferred the action as to defendants Select Operating Corporation and United Booking Office, Inc. to this Court. Since there is nothing to support the pendency of the action here, it must be dismissed. *E.g., Wilson v. Kansas City So. Ry.*, 101 F. Supp. 56 (W. D. Mo. 1951). The alternative, remand to the transferor district, would serve no useful purpose because plaintiff's inability to proceed against these defendants in the Pennsylvania forum has already been established. See *Goldlawr v. Shubert*, 169 F. Supp. 677, 686 (1958).

II.

Motion to Substitute the Executors of the Estate of Defendant Heiman.

Cross-Motion to Dismiss as to Heiman for Lack of Jurisdiction.

Marcus Heiman, a New York resident, was named as an original defendant in the action instituted in Pennsylvania. Although he died in September of 1957, the order of March 1959 included Heiman among the defendants as to whom the action was transferred for lack of venue.

Heiman was not found in and had no agents in Pennsylvania. *Goldlawr v. Shubert*, 169 F. Supp. 677, 682 (1958). See Clayton Act § 4, 38 Stat. 731 (1914), 15 U. S. C. § 15 (1958). He was never served personally in Pennsylvania or any other place. The obvious lack of personal jurisdiction over Heiman and the resulting invalidity of the transfer under 28 U. S. C. § 1406(a) would alone impel this Court to grant the cross-motion to dismiss.

In addition, passing consideration of the cross-motion, it is doubtful whether Rule 25(a)(1), Fed. R. Civ. P., may be invoked to authorize substitution of the executors for a defendant who neither appeared nor was served with process. See *United States v. Field*, 25 Fed. Cas. 1067, No. 15,089 (C. C. S. D. N. Y. 1859), Note on Revivor, 14 Fed. 392 (1882); *cf. Carnes v. Strait*, 270 S. W. 2d 920 (Ark. 1954). Substitution at this late date would be particularly anomalous since the motion to transfer from Pennsylvania was interposed for the first time after Heiman's death. Therefore at no time during his life was he amenable to service of process in this action.

III.

Motions to Dismiss for Pendency of Another Action.

The original complaint in this action who filed in October of 1956. In February of 1957 plaintiff, who was unable to obtain a prompt hearing on its motion to amend, filed a second complaint. This second complaint added certain defendants and extended the period for which damages were claimed but was otherwise identical with the first complaint. Therefore when the Court in Pennsylvania ordered severance and transfer, two actions, identical in all respects, were docketed in this District, the first of the Pennsylvania complaints having, in the meantime, been amended.

The three remaining defendants, William Klein, Milton Shubert, and Sylvia W. Golde have moved for a dismissal of one of these actions on the ground that there is a similar

action pending. Plaintiff opposes the motion on the ground that its rights under the Statute of Limitations can best be protected by preserving both actions.

In order to protect plaintiff's interest and, at the same time, spare defendants the burden of duplicating their efforts in this cause, the two actions will be consolidated for the purpose of all further proceedings. See Rule 42(a), Fed. R. Civ. P.

Settle appropriate orders on notice for dismissal as to defendants Select Operating Corporation, United Booking Office, Inc., and Marcus Heiman and for consolidation of the actions against Milton Shubert, William Klein and Sylvia W. Golde.

Dated: New York, N. Y.
August 10, 1959.

/s/ EDMUND L. PALMIERI,
Edmund L. Palmieri,
U. S. D. J.

Office Supreme Court, U.S.
JUN 1961

IN THE

Supreme Court of the United States

October Term, 1961.

No. [redacted].

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

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INDEX.

	Page
OPINIONS BELOW	1
QUESTION PRESENTED	2
STATUTE SOUGHT TO BE INVOKED	2
STATEMENT OF THE CASE	3
ARGUMENT	7
The Reasons Relied Upon by Petitioner for Allowance of the Writ Do Not Justify Its Issuance	7
A. The Construction of Section 1406(a) for Which Petitioner Contends Is Not Sanctioned by the Statute	7
B. The Decisions of the Courts of Appeals Are Not in Conflict	11
CONCLUSION	15

CASES CITED.

	Page
Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F.2d 590 (D.C. Cir. 1960)	11, 12, 13
Hayes v. Livermont, 279 F.2d 818 (D.C. Cir. 1960)	13
Hohensee v. News Syndicate, Inc., 286 F.2d 527 (3rd Cir. 1961)	8, 9, 11, 13
Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955)	13, 14
Orion Shipping and Trading Company v. United States, 247 F.2d 755 (9th Cir. 1957)	11
Schiller v. Mit-Clip Co., 180 F.2d 654 (2nd Cir. 1950)	13

STATUTES AND AUTHORITIES CITED.

	Page
Clayton Act:	
Section 4, 15 U.S.C. § 15	14
Section 12, 15 U.S.C. § 22	3, 14
Interlocutory Appeals Act, 28 U.S.C. 1292(b)	2, 5
Judicial Code, Section 1406(a), 28 U.S.C. § 1406(a)	2, 7, 10, 11, 12
Sen. Rep. No. 303, 81st Cong., 1st Sess., U.S. Code Cong. Serv. 1253 (1949)	8

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 981.

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Second Circuit is reported at 288 F.2d 579, and is printed in Appendix A to the Petition. The prior opinion of the Court of Appeals for the Second Circuit directing the dismissal of petitioner's appeal to that court and on rehearing vacating the order of the District Court for the Southern District of New York to enable petitioner to invoke the jurisdiction of the Court of Appeals *nunc pro tunc* under the

Interlocutory Appeals Act, 28 U.S.C. 1292(b), is reported at 273 F.2d 729. The opinion of the District Court for the Southern District of New York is reported at 175 F. Supp. 793 and is printed in Appendix C to the Petition.

QUESTION PRESENTED.

Does Section 1406(a) of the Judicial Code permit a district court to transfer a private antitrust action to another district when the transferor court lacks personal jurisdiction over the defendants?

STATUTE SOUGHT TO BE INVOKED.

Petitioner seeks to invoke Section 1406(a) of the Judicial Code, 28 U.S.C. § 1406(a), in support of its contention that a district court has the power to transfer a private antitrust action to another district when the transferor court lacks personal jurisdiction over the defendants. Section 1406(a) provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

STATEMENT OF THE CASE.

Petitioner instituted this private antitrust action in the United States District Court for the Eastern District of Pennsylvania against numerous corporate and individual defendants including respondents, Select Operating Corporation and United Booking Office, Inc., on October 17, 1956.[1] Thereafter, respondents and others filed timely motions to dismiss the action for lack of jurisdiction over their persons, to dismiss for improper venue and to quash the returns of service. Petitioner has conceded that the District Court for the Eastern District of Pennsylvania never acquired jurisdiction over the persons of respondents.[2]

On December 22, 1958, the District Court for the Eastern District of Pennsylvania, Kraft, J., rendered an opinion in which the motions of respondents to dismiss for improper venue were granted on the ground that neither was an inhabitant, nor was found nor transacted business in the Eastern District of Pennsylvania within the meaning of Section 12 of the Clayton Act, 15 U.S.C. § 22.[3] Be-

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1. On February 18, 1957, petitioner instituted a second action in the Eastern District of Pennsylvania which differed from the first only to the extent that the second added certain defendants and sought to extend the period for which damages were claimed. The cases subsequently were consolidated and can be treated together for the purpose of the instant Petition.

2. Petitioner has never contended that the purported service of process which petitioner attempted to make upon respondents in the Eastern District of Pennsylvania was effective. Nor has petitioner challenged in the Court of Appeals or in the instant Petition the holding of the district court below that the extraterritorial service of process upon respondents in the Southern District of New York was insufficient to subject them to the jurisdiction of the Pennsylvania court.

3. At the same time, motions to dismiss for lack of personal jurisdiction, improper venue and to quash returns of service were denied with respect to J. J. Shubert, John Shubert and Select Theatres Corporation as to whom (and others) petitioner's action presently is pending in the Eastern District of Pennsylvania.

fore orders were entered in accordance with the opinion, however, petitioner filed a motion to transfer the action to the District Court for the Southern District of New York. On March 3, 1959, the District Court for the Eastern District of Pennsylvania ordered the action transferred as to respondents and others[4] to the District Court for the Southern District of New York, notwithstanding the Pennsylvania court's lack of jurisdiction over the persons of respondents.

Immediately following the transfer, respondents filed motions to dismiss the action in the district court below on the ground that the transfer was invalid, improper and without statutory sanction. On August 10, 1959, the district court, Palmieri, J., rendered an opinion holding that the transfer as to respondents was invalid because Section 1406(a) of the Judicial Code does not allow the transfer of a civil action to another district when the transferor court lacks personal jurisdiction over the defendants. The remaining defendants as to whom the action was transferred filed answers to the complaint before attempting to challenge the transfer. Judge Palmieri subsequently ruled that those defendants, unlike respondents, had waived the right to contest the transfer by filing answers. As a result, the action presently is pending as to the remaining defendants in the district court below.

On September 1, 1959, Judge Palmieri entered an order dismissing the action as to respondents which expressly directed that "there is no just reason for delay and this Court directs the entry of judgment in favor of said Select Operating Corporation, United Booking Office, Inc., and Marcus Heiman" in conformity with Federal Rule 54(b). On September 25, 1959, petitioner filed a notice of appeal to the court below, and on November 30, 1959, respondents filed a motion to dismiss the appeal on the ground that the

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4. In addition to respondents, the action was transferred as to defendants Sylvia W. Golde, Milton Shubert and William Klein.

order of the district court below was interlocutory and not appealable.

On December 29, 1959, the court below (Lumbard, C.J., Swan, J., and Friendly, J.) held that the order was not appealable because an order directing dismissal of one or more, but less than all, of multiple defendants jointly charged, does not constitute "the entry of a final judgment upon one or more but less than all of the claims" presented in a multiple claims action within the meaning of Rule 54(b).

On January 11, 1960, petitioner filed a petition for rehearing in the court below and in the alternative petitioned for amendment of the court's order to permit petitioner the right to appeal *nunc pro tunc*, under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b).[5]

On January 18, 1960, the court below denied the petition for rehearing, but vacated Judge Palmieri's order of September 1, 1959, "for the sole purpose of permitting him to 'enter a fresh decree' in which he may include the statement described in 28 U.S.C. § 1292(b) if in his full discretion he determines that such a statement is here justified." 273 F.2d at 731.

On January 27, 1960, Judge Palmieri entered an order which included the statement contemplated by the Interlocutory Appeals Act, and on February 2, 1960, petitioner

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5. The Interlocutory Appeals Act authorizes appeals from orders not otherwise appealable, provided that:

(1) The district judge includes in the order complained of the statement required by the Act; and

(2) The party seeking appellate review makes application to the Court of Appeals for leave to appeal within ten days after the entry of the order complained of; and

(3) The Court of Appeals, in its discretion, grants leave to take such an appeal.

Judge Palmieri's interlocutory order of September 1, 1959, from which petitioner sought to appeal did not contain the statement contemplated by the Act, and petitioner did not seek to invoke its provisions until January 11, 1960, four months and ten days after the entry of the order from which petitioner sought interlocutory relief.

filed an application in the court below for leave to take an interlocutory appeal. On March 7, 1960, the court below (Lumbard, C.J., Waterman, J., Moore, J., and Friendly, J., with Clark, J., dissenting) granted petitioner's application without opinion.

On February 21, 1961, the court below (Moore, J., Waterman, J., with Hincks, J., dissenting) affirmed the decision of the district court and held that Section 1406(a) does not permit the transfer of an action to another district where the transferor court lacks jurisdiction over the persons of defendants.

ARGUMENT.

The Reasons Relied Upon by Petitioner for Allowance of the Writ Do Not Justify Its Issuance.

Petitioner claims that the Writ should be allowed because the Court of Appeals' construction of Section 1406(a) is "unwarranted and unduly restrictive"[6] and because its decision conflicts with those of the Courts of Appeals for the Fourth, Ninth and District of Columbia Circuits. Neither contention has merit.

A. *The Construction of Section 1406(a) for Which Petitioner Contends Is Not Sanctioned by the Statute.*

Section 1406(a) merely authorizes the transfer of "a case laying venue in the wrong division or district." There is no warrant, statutory or otherwise, for construing that provision to permit transfer when the transferor court lacks jurisdiction over the persons of defendants. Petitioner seeks to attribute to Congress an intention which the statute does not disclose and which is not apparent from its legislative history.

As initially enacted in 1948, Section 1406(a) required transfer when venue was improperly laid. It was recognized, however, that the provision for mandatory transfer might be subject to abuse. To avoid this possibility, Congress amended Section 1406(a) in 1949 to make transfer optional in the discretion of the district court. The Senate Report states:

> "It is thought that this provision [the 1948 version of § 1406(a)] may be subject to abuse in that a plaintiff might deliberately bring a suit in the wrong division or district *where he could get service on the defendant*, and when the question of venue is raised

6. Petition, p. 6.

> the court is required to transfer the case to the court where it 'could have been brought.' *However, in the meantime, service has been perfected on a defendant in the wrong venue, and it will carry over into the new (and proper) venue.*" (Emphasis added.)[7]

Implicit in the foregoing statement is Congress' recognition that Section 1406(a) is inoperative unless plaintiff brings suit in a district "where he could get service on the defendant" and that it is a prerequisite to transfer that "service has been perfected on a defendant in the wrong venue. . . ." Accordingly, it is clear that Congress did not intend Section 1406(a) to authorize transfer when the transferor court lacks personal jurisdiction over the defendant.

The Third Circuit agrees:

> ". . . The sole purpose of this section [1406(a)] as well as its companion, 28 U.S.C. § 1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. Venue has to do with determining the proper place where litigation may proceed. It has nothing to do with determining the extent of the area in which a party defendant may be properly served. The appellant here is, in effect, attempting to turn a venue provision into a device for including New York within the area where appellee can be properly served under Rule 4(d) of the Federal Rules of Civil Procedure, 28 U.S.C.A., in an action commenced in Pennsylvania. We are satisfied that Section 1406 was never intended to serve as a means of avoiding the consequences of a failure to perfect service of process. It would take a clear congressional mandate for this court to allow that section to be used as a shorthand

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7. Sen. Rep. No. 303, 81st Cong., 1st Sess., U.S. Code Cong. Serv. 1253 (1949).

method for assisting a party to effect jurisdiction of the person."[8]

And as the court below correctly observed:

> ". . . . Whatever be the desirability of a rule that a district court may transfer a case when venue is mislaid and jurisdiction over the person of the defendant is lacking, it is an unwarranted exercise of judicial interpretation to find that a statute, expressly providing for transfer to cure a venue defect, impliedly provides for a transfer to cure a more basic jurisdictional defect. The lesser does not by implication include the greater."[9]

Petitioner contends that the decision below is contrary to Congressional policy to facilitate private enforcement of the antitrust laws. But Section 1406(a), which is applicable to civil cases generally, was not enacted to aid or impede antitrust cases in particular. Moreover, petitioner disregards the fact that the Congressional policy to facilitate private antitrust litigation, with which the decision below is claimed to conflict, was expressly implemented by Congress in Section 12 of the Clayton Act, 15 U.S.C. § 22, which authorizes extraterritorial service of process upon a corporate defendant transacting business in the forum. And as the court below stated, petitioner's "real difficulty here is that it has failed to meet the requirements of that section."[10]

Petitioner's assertion that the decision below will have "far reaching effect . . . for all litigants bringing suit under the many federal statutes governed by similar venue provisions"[11] is equally without basis. The decision below

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8. *Hohensee v. News Syndicate, Inc.*, 286 F.2d 527, 529-30 (3rd Cir. 1961).

9. Petition, Appendix A, p. 6a.

10. Petition, Appendix A, p. 13a.

11. Petition, p. 8.

did not involve the construction of a venue statute. The decision below in no way inhibits petitioner's, or any private litigant's, ability to institute suit in a district in which a defendant is found or transacts business under any of the statutes cited by petitioner. On the contrary, the decision of which petitioner complains becomes operative only where, as here, a plaintiff fails to institute suit in such a district *and* fails to perfect service upon the defendant.

Finally, petitioner urges that the decision below should be overturned because of the hardship it imposes upon petitioner. But petitioner does not disclose that despite a challenge to the court's jurisdiction made by respondents in 1956 in the Eastern District of Pennsylvania, petitioner did not take the precautionary step of preserving its rights under the statute of limitations by filing suit against respondents in the Southern District of New York until August 20, 1959, subsequent to the decision of the district court below. Petitioner could have avoided the claimed hardship resulting from the decision below by the prompt prosecution of its claims in the Southern District of New York where respondents and all of the other defendants were amenable to suit, when alerted in 1956 of the jurisdictional defects attending the action instituted in Pennsylvania.

All of the arguments now advanced by petitioner in support of its contention that Section 1406(a) authorizes the transfer in the absence of personal jurisdiction were rejected by the court below. The refusal below to adopt petitioner's contention was correct because, as the court noted:

> ". . . Any attempts by the courts to enact by their decisions so radical a procedural innovation, particularly where the effect of such decisions is to narrow the requirement of jurisdiction over the person, would invade legislative territory." [12]

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12. Petition, Appendix A, p. 13a.

Respondents submit that the construction of Section 1406(a) adopted by the court below is the only one sanctioned by the statute. For this reason alone the Petition should be denied.

B. *The Decisions of the Courts of Appeals Are Not in Conflict.*

The decision below is asserted to conflict with the decisions of the Fourth, Ninth and District of Columbia Courts of Appeals. Respondents submit that the decisions relied upon by petitioner as conflicting with the decision below and that of the Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc., supra*, are either inapplicable or the proposition for which they are cited by the petitioner was not in issue or was conceded without argument in those cases.

Petitioner's citation of *Orion Shipping and Trading Company v. United States*, 247 F.2d 755 (9th Cir. 1957), is typical. *Orion* was an appeal from the dismissal of third party proceedings instituted by a ship owner against the United States under the Federal Tort Claims Act seeking to compel contribution with respect to plaintiff's common law judgment for injuries sustained as a result of the unseaworthiness of defendant's vessel. The United States claimed that venue was improperly laid since Orion did not reside or have its principal place of business in the district in which suit was instituted. The Court of Appeals held that the dismissal was erroneous and remanded with directions to transfer the action pursuant to Section 1406(a) of the Judicial Code. *Orion* in no respect involved the power of the district court to transfer in the absence of personal jurisdiction. There, the transferor court had jurisdiction over the person because the third party defendant had "appeared and answered." 247 F.2d at 758.

Petitioner likewise seeks to create the impression that *American Contact Plate Freezers, Inc. v. Knowles*, 274 F.2d 590 (D.C. Cir. 1960), held that Section 1406(a) authorizes

transfer in the absence of personal jurisdiction. Although the language quoted by petitioner appears to conflict with the decision below, the proposition for which it is cited was there conceded without argument. In *Amerio*, the plaintiff brought suit in a district in which venue was improperly laid. In addition, it appeared that the plaintiff failed to make proper service of process on the defendant. The lower court granted defendant's motion to dismiss for lack of jurisdiction and denied plaintiff's motion to transfer pursuant to Section 1406(a). On appeal, appellee, the defendant below, argued merely that the transferor court lacked jurisdiction over the *subject matter of the action*, and that, as a result, the district court was powerless to order the transfer. In fact, the appellee expressly conceded that the transferor court's lack of personal jurisdiction over the appellee was no bar to the requested transfer.

> "Appellant relies on *Schiller v. Mit-Clip Co.* . . . as standing for the proposition that a civil action may be transferred to another district to correct venue where the transferring district has jurisdiction of the subject matter of the action, but not of the person of the defendant. *We do not disagree with the statement of the rule.* . . .
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> • • •
>
> "It is appellee's position that . . . special jurisdictional prerequisites . . . were not met in this case and that because of this fact the District Court for the District of Columbia *obtained no jurisdiction over the subject matter of this action. It accordingly properly refused to transfer the case and dismissed the action.*" (Emphasis added.) [13]

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13. Appellee's Brief on Appeal in *Amerio Contact Plate Freezers, Inc. v. Knowles*, in the United States Court of Appeals for the District of Columbia Circuit, No. 15,150, pp. 12-13, 15.

Accordingly, petitioner's reliance upon *Amerio* is unwarranted because the proposition for which petitioner cites *Amerio* was there conceded without argument. And in *Hayes v. Livermont*, 279 F.2d 818 (D.C. Cir. 1960), the question of whether a district court has the power to transfer in the absence of personal jurisdiction does not appear to have been in issue.[14]

Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955), also relied on by petitioner, was an admiralty action. As Judge Staley, speaking for the court in *Hohensee v. News Syndicate, Inc., supra*, stated (p. 530, n. 6):

> ". . . Admiralty cases . . . are inapposite for the reasons succinctly stated in another admiralty case

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14. *Hayes v. Livermont* relies only on *Amerio* and *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955) which is inapplicable for the reasons set forth *infra*. *Amerio* in turn is primarily derived from a misconception of *Schiller v. Mit-Clip Co.*, 180 F.2d 654 (2nd Cir. 1950). And as the court below observed with respect to its earlier decision (Petition, Appendix A, p. 10a):

> "*Schiller* cannot correctly be accepted, as it appears it mistakenly has been, for the proposition that section 1406(a) authorizes transfer in the absence of personal jurisdiction of a defendant. In that case the defendants moved to dismiss for lack of personal jurisdiction and improper venue. It was the court which *sua sponte* ordered the transfer. However, on appeal the plaintiff objected to the transfer and the defendant argued in support of the transfer. In assessing that case, it must be recognized that personal jurisdiction requirements are for the benefit of defendants. If a defendant chooses to waive such jurisdictional objections, he may. Thus, any learning to be derived from *Schiller* in regard to Section 1406(a) must be limited to cases in which the defendant may be said to have waived his right to object to the jurisdiction of the transferor court by arguing for the transfer. No such waiver of jurisdictional objections here exists."

appellant cites, *Internatio-Rotterdam, Inc. v. Thomsen*, 4 Cir., 1955, 218 F.2d 514, 515, where Judge Parker said:

> 'As the suits were in admiralty, they might have been instituted in any district court of the United States. * * * It is proper to institute a suit in admiralty in a district in which there is no person who can be served with process and no property which can be seized, if it is made to appear that property which can be seized under process therein is expected to be within the district shortly * * *.'"

Moreover, as Judge Parker noted in *Internatio*, venue is a concept foreign to admiralty (218 F.2d at 516, n. 1):

> "A suit in admiralty must be distinguished in this respect [institution of suit] from a civil action based on diversity of citizenship in which venue is limited by statute."

Accordingly, since the venue of antitrust suits, like diversity actions, is limited by statute,[15] *Internatio* cannot conflict with the decision below.

Respondents submit that the decisions relied upon by petitioner are not in conflict with the decision below because such decisions are either inapposite or the proposition for which they are cited by petitioner was not in issue or was conceded without argument in those cases.

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15. Clayton Act, Sections 4 and 12, 15 U.S.C. §§ 15, 22.

CONCLUSION.

The decision below is clearly correct and the decisions of the Courts of Appeals are not in conflict. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967

No. [illegible]

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SUE COE OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

Brief of Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased, in Opposition to Petition for a Writ of Certiorari

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INDEX TO BRIEF

	PAGE
Preliminary Statement	1
Statement of the Case	3
Argument	7
POINT I.—No substantial or important question as to Marcus Heiman is presented for review. The Court of Appeals for the Second Circuit was unanimous in affirming the order below as to him	8
POINT II.—Petitioner has acquiesced in the affirmance as to Marcus Heiman. The question presented for review is moot as to him. A review as to Marcus Heiman would be wholly ineffectual for lack of a proper party upon whom even a reversal might operate	11
POINT III.—The judgment of the Court of Appeals sought to be reviewed is not such a final judgment and the issues involved as to Marcus Heiman are not of such fundamental importance as to warrant a review by the Court	13
POINT IV.—There is no real conflict of decisions among the several Circuits; any disagreement existing prior hereto has been resolved by the decision below of the Court of Appeals for the Second Circuit by it having explained its earlier decision of *Schaller* v. *Mit-Clip Co., Inc.*, 180 F. 2d 654	16
CONCLUSION	19

TABLE OF CASES CITED

	PAGE
Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F. 2d 590 (D. C. Cir. 1960)	16, 17, 18, 19
Anderson v. Yungkau, 329 U. S. 482, 485-486 (1946)	12
Clarke v. Mathewson, 12 Pet. 164, 171 (U. S. 1838)	10
Continental Grain Co. v. Barge, FBL-585, 364 U. S. 19, 21-22 (1960)	18
Cover v. Schwartz, 133 F. 2d 541 (2nd Cir. 1942), cert. den. 319 U. S. 748	12
Ex Parte Slater, 246 U. S. 128, 133 (1918)	10
Fistel v. Beaver Trust Co., 94 F. Supp. 974 (S. D. N. Y. 1950)	16
Foster-Milburn Co. v. Knight, 181 F. 2d 949, 951-952 (2nd Cir. 1950)	10
Goldlawr, Inc. v. Heiman, 273 F. 2d 729 (2nd Cir. 1959)	2, 13
Goldlawr, Inc. v. Heiman, 288 F. 2d 579 (2nd Cir. 1961)	1, 2, 8, 16, 17
Goldlawr, Inc. v. Heiman, 175 F. Supp. 793 (S. D. N. Y. 1959)	6, 8, 9
Goldlawr, Inc. v. Shubert, 169 F. Supp. 677 (E. D. Pa. 1958)	3, 5
Goldlawr, Inc. v. Shubert, 25 F. R. D. 276 (S. D. N. Y. 1960)	6

PAGE

Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251, 258 (1915) 14

Hargrove v. Louisville & Nashville Railroad Co., 153 F. Supp. 681 (W. D. Ky. 1957) 16

Hayes v. Livermont, 279 F. 2d 818 (D. C. 1960) 16, 19

Hoffman v. Blaski, 363 U. S. 335 (1960) 10, 18

Hohensee v. News Syndicate, Inc., 286 F. 2d 527 (3rd Cir. 1961) 16

In Re Josephson, 218 F. 2d 174 (1st Cir. 1954) 16

International Rotterdam, Inc. v. Thomsen, 218 F. 2d 514 (4th Cir. 1955) 16, 18, 19

McDaniel v. Drotman, 103 F. Supp. 643 (W. D. Ky. 1952) 16

Mills v. Green, 159 U. S. 651, 653 (1895) 11

Oil Workers Unions v. Missouri, 361 U. S. 363, 367 (1959) 11

Orion Shipping & Trading Co. v. United States, 247 F. 2d 755 (9th Cir. 1957) 18

Petroleum Financial Corp. v. Stone, 116 F. Supp. 426 (S. D. N. Y. 1953) 18

Schiller v. Mid-City Co., Inc., 180 F. 2d 654 (2nd Cir. 1950) 8, 16, 17

The Monrosa v. Carbon Black, Inc., 359 U. S. 180, 183 (1959) 12

Trailmobile Co. v. Whirls, 331 U. S. 40, 48 (1946) 12

PAGE

United States v. Welch, 151 F. Supp. 899 (S. D. N. Y. 1957) 18

Wilson v. Kansas City So. Ry. Co., 101 F. Supp. 56 (W. D. Mo. 1951) 16

STATUTES AND AUTHORITIES CITED

1 AM. JUR., Abatement & Revival, 159 (1936) 10

1 C. J. S., Abatement & Revival, 161 (1936) 10

Federal Rules of Civil Procedure:

Rule 25(a) 11, 12

Rule 54(b) 2, 13

Note, 68 Harv. L. Rev. 1069 (1955) 18

15 U. S. C. § 1 & 2 13

28 U. S. C. § 1292(b) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 981

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

Brief of Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased, in Opposition to Petition for a Writ of Certiorari

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Preliminary Statement

Petitioner, plaintiff below, seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed the order dated January 27, 1960 of the United States District Court for the Southern District of New York.[1] Said order (1) dismissed the complaints below as to the corporate defendants, Select Operating Corporation and United Booking Office, Inc., for lack of jurisdiction over the person of said

[1] The opinion of the Court of Appeals is officially reported at 288 F. 2d 579 (advance sheets May 26, 1961).

corporate defendants, and (2) dismissed the complaints as to Marcus Heiman for lack of jurisdiction over his person and denied the motions of plaintiff to substitute the executors of the Estate of Marcus Heiman, deceased, as party defendants in place of Marcus Heiman (See pp. 71a 72a of appellant's appendix in the Second Circuit).[2]

The affirmance by the Court of Appeals for the Second Circuit as to respondent Marcus Heiman was unanimous. *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579, 587.[3]

The question presented for review by petitioner, namely—

> "Whether the District Court for the Eastern District of Pennsylvania * * * had the power to transfer the case for improper venue under 28 U. S. C. §1406(a) without having obtained personal jurisdiction over the transferred respondents?" (petitioner's brief, pp. 2-3),

does not bring up for review the propriety of the affirmance as to Marcus Heiman. The position of respondent Marcus Heiman on this application is different from that of the two corporate respondents.

[2] The order was filed jointly in two civil actions, Nos. 244 243 and 244 243 U. S. D. C. S. D. N. Y. entitled "Goldlawr, Inc., Plaintiff v. Milton Shubert, William Klein, Sylvia W. Golde, Marcus Heiman, Select Operating Corporation and United Booking Office, Inc., Defendants."

[3] The Court of Appeals for the Second Circuit had originally dismissed the appeal taken from the District Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure *Goldlawr, Inc.* v *Heiman*, 273 F. 2d 729; but on rehearing permitted the District Court to "enter a fresh decree" for an appeal pursuant to 28 U. S. C. §1292(b) *Goldlawr* v *Heiman*, 275 F. 2d 729, 731.

Statement of the Case

Marcus Heiman died a resident and domiciliary of New York, New York, on September 9, 1957, almost eleven months after the first complaint was filed (C. A. No. 22092, U. S. D. C., E. D. Pa.; 144-243, S. D. N. Y.) The Morgan Guaranty Trust Company of New York and Asher Levy were issued letters testamentary by the Surrogate's Court of the State of New York on October 1, 1957.[4]

On March 3, 1959, the date the United States District Court for the Eastern District of Pennsylvania ordered the actions transferred to the Southern District of New York, Marcus Heiman had been dead some fifteen months; he had not been personally served with process; the District Court had held that Marcus Heiman neither was found nor had an agent in Pennsylvania and had held venue there improper as to him (*Goldlawr, Inc.* v. *Shubert*, 169 F. Supp. 677, 679-682; petitioner's appendix B, pp. 20a-23a); Marcus Heiman had not waived lack of jurisdiction over his person or improper venue; ***his executors had not been substituted as party defendants;*** there had been no appearance by the Estate of Marcus Heiman; the estate had not received any legal notice of the pendency of the actions; there was no one before the District Court at the date of transfer authorized to represent the deceased, Marcus Heiman, or his estate.

The Marshal's returns of service in the United States District Court for the Eastern District of Pennsylvania for Marcus Heiman in each of the actions stated in substance that service had been made upon Marcus Heiman by leaving a copy of the summons and complaint with a

[4] By an intermediate decree of the Surrogate's Court dated June 18, 1960, Asher Levy was permitted to resign and Morgan Guaranty Trust Company of New York was appointed sole Executor of the Estate of Marcus Heiman.

woman in charge of an office at 209 Quince Street, Philadelphia, Pennsylvania, and that service had been made in that manner on the advice of plaintiff's attorney (R. 18, 501).[3]

Plaintiff's attorney knew Marcus Heiman could only be served within the Southern District of New York. At the time that plaintiff's attorney directed service on Marcus Heiman in the foregoing manner, he directed the Marshal in New York to serve the defendant United Booking Office, Inc., of which Marcus Heiman was president and a director, by serving Marcus Heiman at his business "236 West 44th Street" or at his home "24 West 55th Street", New York, New York. (See Exhibit B-1 to affidavit of Harold E. Kohn, Esq., sworn to June 17, 1959, at R. 217, 226, 736, 745, printed at p. 18b of the appendix of the executors of the Estate of Marcus Heiman in the Court of Appeals for the Second Circuit.)

After the returns of service as aforesaid, Marcus Heiman and other defendants in each of the actions moved to quash the respective returns of service and to dismiss the actions for lack of jurisdiction over their persons and for improper venue.

In opposing these motions petitioner made no effort whatsoever to sustain the service upon Marcus Heiman or to sustain Philadelphia as a proper venue as to him. Petitioner filed a 32 page affidavit, a 12 page brief and offered voluminous evidence and documents in opposition to the motions. Not one word was offered by petitioner to support the venue as to Marcus Heiman or the service upon him (R. 190).

Marcus Heiman died after argument of these motions but prior to their decision. Petitioner was officially in-

[3] Refers to pages of Record on Appeal in the Court of Appeals for the Second Circuit.

formed of the death of Marcus Heiman in January, 1958. Nonetheless, petitioner took no action to substitute the executors as party defendants or to inform the Court (R. 234).

On December 22, 1958, Judge Kraft filed an opinion in both actions sustaining the motions of Marcus Heiman to dismiss for improper venue. *Goldlawr, Inc. v. Shubert*, 169 F. Supp. 677, 679-682. Judge Kraft did not pass upon the motion to dismiss for lack of jurisdiction over the person of Marcus Heiman presumably because he was prepared to dismiss for lack of improper venue. When Judge Kraft reversed his opinion and ordered transfer instead of dismissal, he continued to disregard the motion to dismiss for lack of jurisdiction over the person. Petitioner has conceded that jurisdiction over the person of Marcus Heiman has never been acquired. *Goldlawr, Inc. v. Heiman*, 288 F. 2d 579, 582.[6]

After transfer to New York, petitioner served upon the executors notices of motion dated May 11, 1959 to substitute them as party defendants in place of Marcus Heiman (petitioner's appendix in Second Circuit, p. 62a). For the first time since the death of Marcus Heiman, some eighteen months prior thereto, the estate was given legal notice of the pendency of these actions against Marcus Heiman. Until the applications to substitute the executors were made before the United States District Court for the Southern District of New York, no papers of any name, nature or description had been served or filed upon the estate. A formal claim had not even been filed in connection with the proceedings before the Surrogate's Court. After service of the notices of motion for substitution, the executors appeared in the District Court

[6] Plaintiff in fact admitted service would have to be effected in New York after transfer. See Exhibit C, at page 14b of appendix of Select Operating Corporation *et al.* in the Second Circuit.

for the Southern District of New York to oppose them and to cross move for the dismissal of the actions. (See pp. 1b-3b of appendix of executors in the Second Circuit.)

The dismissal by the District Court for the Southern District of New York (*Goldlawr, Inc.*, v. *Heiman*, 175 F. Supp. 793) did not terminate petitioner's rights or preclude him from his day in court. The original actions are still pending in the United States District Court for the Eastern District of Pennsylvania against Jacob Shubert, Lawrence Shubert Lawrence, John Shubert, Select Theatres Corporation, Modern Theatre Corporation, Barrymore Theatre Corporation and L. A. B. Amusement Corporation.[7] The transferred actions are still pending in the United States District Court for the Southern District of New York as to three defendants: Milton Shubert, William Klein and Sylvia W. Golde. (See *Goldlawr Inc.* v. *Shubert*, 25 F. R. D. 276, S. D. N. Y. 1960.) Immediately after the dismissal below as to the respondents, petitioner instituted a new action on August 20, 1959, naming as defendants the Executors of the Estate of Marcus Heiman and the two corporate respondents (C. A. 149 349 S. D. N. Y.).[8] This third action seeks $2,150,000.00 treble damages of which $1,050,000.00 is sought from the Estate of Marcus Heiman for the period August 20, 1955 to September 9, 1957 (the date of death). Issue has been joined in this latter action.

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[7] According to petitioner's own statement, Jacob Shubert is the principal defendant in all of these actions. In its brief in support of its petition at page 4, petitioner states: "This is a private antitrust action brought * * * against Jacob Shubert and several other persons and corporations identified with the Shubert interests * * *."

[8] Plaintiff, upon being alerted by the motions of Marcus Heiman to quash service and to dismiss etc. could have protected its rights by starting an action in 1956 against Marcus Heiman during his lifetime in the Southern District of New York; instead plaintiff chose to wait three years.

Argument

Although petitioner appealed to the Court of Appeals from both the dismissal of the actions as to Marcus Heiman and from the denial of the motions for substitution, and although petitioner advanced below several arguments to sustain transfer as to Marcus Heiman and to justify substitution of his executors as party defendants at such late date, on this application petitioner (1) has limited its request for review to a single question having no effective bearing on the issue of transfer with respect to Marcus Heiman specifically and having no bearing on the issue of substitution of his executors as party defendants; and (2) has limited its argument to seeking a review of the propriety of the transfer with respect to the corporate respondents only.

In opposing the present petition for certiorari, Morgan Guaranty Trust Company of New York on behalf of respondent, Marcus Heiman, respectfully urges the following points:

1. No substantial or important question as to Marcus Heiman is presented for review; the Court of Appeals for the Second Circuit was unanimous in affirming the order below as to him;

2. Petitioner has acquiesced in the affirmance as to Marcus Heiman. The question presented for review is moot as to him. A review as to Marcus Heiman would be wholly ineffectual for lack of a proper party on whom even a reversal might operate;

3. The judgment of the Court of Appeals sought to be reviewed is not such a final judgment and the issues involved as to Marcus Heiman are not of such

fundamental importance as to warrant a review by the Court;

4. There is no real conflict of decisions among the several circuits; any disagreement existing prior hereto has been resolved by the decision below of the Court of Appeals for the Second Circuit by it having explained its earlier decision of *Schiller v. Mit-Clip Co., Inc.*, 180 F. 2d 654.

POINT I

No substantial or important question as to Marcus Heiman is presented for review. The Court of Appeals for the Second Circuit was unanimous in affirming the order below as to him.

Judge Hincks of the Court of Appeals began his dissent as follows:

> "I agree with my brothers that the order below as to Heiman should be affirmed."
>
> *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579, 587.*

Judge Palmieri in dismissing the actions as to Marcus Heiman and in denying the motions of plaintiff for substitution of the executors wrote:

> "Marcus Heiman, a New York resident, was named as an original defendant in the action instituted in Pennsylvania. Although he died in September of 1957, the order of March 1959 included Heiman among the defendants as to whom the action was transferred for lack of venue.

* The balance of his opinion is directed to the issues as they affect the corporate respondents only

Heiman was not found in and had no agents in Pennsylvania. *Goldlawr* v. *Shubert*, 169 F. Supp. 677, 682 (1958) See Clayton Act §4, 38 Stat. 731 (1914), 15 U. S. C. §15 (1958). He was never (1914), 15 U. S. C. §15 (1958). He was never served personally in Pennsylvania or any other place. The obvious lack of personal jurisdiction over Heiman and the resulting invalidity of the transfer under 28 U. S. C. §1406(a) would alone impel this Court to grant the cross-motion to dismiss.

In addition, passing consideration of the cross-motion, it is doubtful whether Rule 25(a)(1), Fed. R. Civ. P., may be invoked to authorize substitution of the executors for a defendant who neither appeared nor was served with process. See *United States* v. *Field* 25 Fed. Cas. 1067, No. 15,089 (C. C. S. D. N. Y. 1850), Note on Revivor, 14 Fed. 392 (1882); cf. *Carnes* v. *Strait*, 270 S. W. 2d 920 (Ark. 1954). Substitution at this late date would be particularly anomalous since the motion to transfer from Pennsylvania was interposed for the first time after Heiman's death. Therefore at no time during his life was he amenable to service of process in this action."

Goldlawr, Inc. v. *Shubert*, 175 F. Supp. 793, 797-798.

Petitioner first moved to substitute the Executors of the Estate of Marcus Heiman as party defendants *only after* transfer to the Southern District of New York. At the time of transfer there was no party to the actions upon whom service with respect to Marcus Heiman could be effected within the jurisdiction either of the Eastern District of Pennsylvania or the Southern District of New

York. Amenability of process in at least the transferee district has always been held a condition precedent to a proper transfer. See and "cf" *Hoffman* v. *Blaski*, 363 U. S. 335, 341-342; *Foster-Milburn* v. *Knight*, 181 F. 2d 949, 951-952 (2nd Cir., 1950). Only the executors of the Estate of Marcus Heiman were amenable to process in the Southern District of New York, but at the time of transfer they were not parties to the action.

Not only was there no party in the Southern District of New York at the time of transfer capable of being served with process as to Marcus Heiman, but also no valid and effective order of transfer could be entered as to a deceased party whose personal representatives had not been brought before the Court. The District Court in the Eastern District of Pennsylvania did not have the power to transfer the actions until they were revived and continued by the proper substitution of the Executors. *Ex Parte Slater*, 246 U. S. 128, 133,; *Clarke* v. *Mathewson*, 12 Pet. 164, 171 (U. S. 1838); 1 C. J. S., Abatement and Revival, §161, p. 213 (1936); 1 AM. JUR., Abatement and Revival, §159, p. 105 (1936).

These foregoing rules of law being fundamental, not in dispute, and having been applied by this Court, raise no substantial or important issue to be reviewed. Petitioner concedes this by virtue of its not having advanced on this application, any argument in this regard. Review as to Marcus Heiman should be denied.

POINT II

Petitioner has acquiesced in the affirmance as to Marcus Heiman. The question presented for review is moot as to him. A review as to Marcus Heiman would be wholly ineffectual for lack of a proper party upon whom even a reversal might operate.

As to respondent Marcus Heiman the court below (i) dismissed for lack of jurisdiction over his person and (ii) held "that the Executors could not be substituted pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure". (Petitioner's brief, p. 5, note "2".)

Petitioner does not seek to review any question with respect to the denial of substitution and does not seek to review whether the United States District Court for the Eastern District of Pennsylvania could validly transfer an action as to a decedent who was not before the court and whose personal representatives had not been substituted prior to the transfer. Petitioner advances no arguments in respect thereto and has accordingly acquiesced in the affirmance as to Marcus Heiman. Petitioner limits this application for review to the propriety of the transfer as to the corporate respondents only. Under these circumstances, the question presented for review is moot as to respondent Marcus Heiman.

> "* * * the duty of this Court * * * 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'"

Oil Workers Unions v. *Missouri*, 361 U. S. 363, 367;
Mills v. *Green*, 159 U. S. 651, 653.

See and "cf." *Corer* v. *Schwartz*, 133 F. 2d 541 (2nd Cir. 1942), cert. den. 319 U. S. 748.

The petitioner no longer seeks to substitute the Executors of the deceased, Marcus Heiman; nor should this Court exercise its discretion to review the issue inasmuch as it is not specifically assigned as error in the petition for certiorari. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48; see and "cf." *The Monrosa* v. *Carbon Black, Inc.*, 359 U. S. 180, 183. Accordingly, even if this Court answered in the affirmative the specific question sought to be reviewed by petitioner, there would be no party with respect to Marcus Heiman upon whom a reversal could be effectual. The issue is moot as to Marcus Heiman.[10]

To compel the Estate of Marcus Heiman to proceed further with this appeal where the petitioner has acquiesced in the affirmance and does not present for review any specific questions with respect to Marcus Heiman would work a manifest prejudice to the estate and would be disruptive of its administration. There is pending below a third action brought by petitioner against the estate seeking from it $1,050,000.00 treble damages. Thus, no prejudice can result to the petitioner by denying certiorari and limiting petitioner to the prosecution of this action pending below. Review should be denied.

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[10] It is doubtful whether at this late date—some 5 years and 9 months after the death of Marcus Heiman, this Court could properly permit substitution of the executor as a party defendant. See *Anderson* v. *Yungkau*, 329 U. S. 482, 485-486; F. R. C. P. 25(a).

POINT III

The judgment of the Court of Appeals sought to be reviewed is not such a final judgment and the issues involved as to Marcus Heiman are not of such fundamental importance as to warrant a review by the Court.

The Court of Appeals for the Second Circuit held that the order of dismissal of the United States District Court for the Southern District of New York as to the respondents did not have the finality to give it appellate jurisdiction. *Goodman, Inc. v. Heiman*, 273 F. 2d 729.[11] The Court of Appeals originally refused to accept appellate jurisdiction because the complaints at bar alleged only a single claim involving multiple parties and the order of the District Court dismissed the action only as to some but not as to all of the parties.[12]

Petitioner filed these actions seeking treble damages for alleged injury resulting from an alleged single conspiracy in violation of the Sherman Antitrust Act, 15 U. S. C. 1 and 2. The complaints as amended, are identical. Civil Action No. 144 241 was originally filed in the United States District Court for the Eastern District of Pennsylvania on October 17, 1956 as Civil Action No. 21506. The companion action, Civil Action No. 144 243, was originally filed on February 18, 1957 in the Eastern District of Pennsylvania as Civil Action No. 22092. Both these actions are still pending in the United States District Court for the Eastern District of Pennsylvania as to seven defendants with respect to whom the actions had not been transferred. The transferred actions (Civil Ac-

[11] The order dated April 12, 1961 of this Court amending Rule 54(b) of the F. R. C. P. recognizes the order below was not final.

[12] Among whom is Isaac Shirtz the principal defendant. See n. 7, *supra*.

tion Nos. 144 243 and 144 244) are likewise still pending in the District Court for the Southern District of New York as to the defendants, Milton Shubert, William Klein and Sylvia W. Golde.

After dismissal as to the respondents at bar, petitioner instituted a third action in the United States District Court for the Southern District of New York naming the present corporate respondents and the executors of the Estate of Marcus Heiman as defendants. This third action and the actions below pending against the aforementioned three other defendants have been consolidated for purposes of trial.

This Court should refuse to entertain the present application as it is not such a final judgment involving issues of such fundamental and extraordinary importance to the respondent Marcus Heiman to warrant a review. Petitioner will not be prejudiced if review is denied. Petitioner will still have its actions in Philadelphia against the principal defendants, including Jacob Shubert. It will still have the actions below as to Milton Shubert, William Klein and Sylvia W. Golde and Civil Action 144 349 with respect to the respondents at bar.

That this Court has power to review a non-final judgment in a proper case is unquestioned. But this Court has said:

> As has been many times declared, this review of a non-final judgment is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision * * * and, except in extraordinary cases, the writ is not issued until final decree * * * .

Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251, 258.

The issues with respect to Marcus Heiman are not so extraordinary and of peculiar gravity to justify review. That a court does not have power to proceed against a party who has died, who was never personally served with process during his lifetime, and whose personal representatives had not been substituted and brought before the Court is not such an extraordinary proposition of law that should be reviewed under the circumstances presented at bar. (Point I, *supra*). Here where several actions all arising from the same litigation are still pending below and where petitioner will not be precluded from his day in court, this Court should refuse to entertain the present application. Any prejudice claimed by petitioner by virtue of having its damage period reduced is a result of petitioner's own folly and bad faith in originally instituting these actions in 1956 as to Marcus Heiman in the United States District Court for the Eastern District of Pennsylvania when it knew it could have originally acquired jurisdiction over Marcus Heiman and many of the other defendants by instituting this action in the United States District Court for the Southern District of New York.[12] Instead of having five different actions pending from the same litigation as is the case currently, petitioner would have had at the most only two. Review should be denied.

[12] See also n. 8, *supra*, p. 6.

POINT IV

There is no real conflict of decisions among the several Circuits; any disagreement existing prior hereto has been resolved by the decision below of the Court of Appeals for the Second Circuit by it having explained its earlier decision of *Schiller* v. *Mit-Clip Co., Inc.*, 180 F. 2d 654.

The Court of Appeals for the Second and Third Circuits are in agreement that transfer without jurisdiction over the person of a defendant is invalid. *Hohensee* v. *News Syndicate, Inc.*, 3 Cir., 286 F. 2d 527; *Goldlawr, Inc.* v. *Heiman*, 2 Cir., 288 F. 2d 579.[14]

The opinions of the Court of Appeals for the District of Columbia and for the Fourth Circuit on their face indicate disagreement with the foregoing. See *Amerio Contact Plate Freezers, Inc.* v. *Knowles*, 274 F. 2d 590 (D. C. 1960); *Hayes* v. *Livermont*, 279 F. 2d 818 (D. C. 1960); *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F. 2d 514 (4th Cir. 1955). *However, no real conflict exists.* The Court of Appeals for the District of Columbia in holding that personal jurisdiction was not necessary relied primarily on the opinion of the Court of Appeals for the Second

[14] The Court of Appeals for the First Circuit has indicated its agreement. In *In re Josephson*, 1 Cir., 218 F. 2d 174 at 185, the Court of Appeals stated that transfer would be improper, i.e., "not in the interest of justice" if a District Court ought to transfer an action without personal jurisdiction over the defendant. Such jurisdiction had been acquired in the transferor court. "Several District Courts prior to the opinions of the Court of Appeals held that personal jurisdiction was necessary." See *McDonald* v. *Dotman*, 165 F. Supp. 943 (W. D. Ky. 1958); *Bishop* v. *Kansas City Southern Railway Co.*, 161 F. Supp. 50 (W. D. Mo. 1958); *Engel* v. *Beaver Lumber Co.*, 94 F. Supp. 974 (S. D. N. Y. 1950); *Bergen* v. *Louisville & Nashville Railroad Co.*, 154 F. Supp. 681 (W. D. Pa. 1957).

Circuit in *Schiller* v. *Mit Clip Co.*, *supra*, and upon other decisions stemming from it. (See n. 15, *infra*.)

Both Judge Moore for the majority and Judge Hincks in his partial dissent recognized that reliance on the opinion of the Court of Appeals in *Schiller* v. *Mit Clip Co.*, *supra*, was misplaced. Judge Moore at 288 F. 2d 579, 584, wrote:

> "The cases, directing transfer under section 1406(a) despite a lack of personal jurisdiction over the defendant, indicate that the view that the section authorizes transfer even in the absence of personal jurisdiction over the defendant had its *genesis in a misconception of the holding of this Court in Schiller* v. *Mit-Clip Co.*, 2 Cir., 1950, 180 F. 2d 654 • • •. The *unwarranted* construction of the statute based on *Schiller* has gained currency by virtue of repetition." (Emphasis added.)

Judge Hincks at 288 F. 2d 579, 587, footnote "1" stated:

> "I [do] agree with the Judge below and with my brothers that the decision of this Court in *Schiller* v. *Mit Clip*, 180 F. 2d 654, does not speak to the precise question now raised although other case have given Schiller a more expansive reading • • •"

That the Court of Appeals for the District of Columbia relied on the *Schiller* case cannot be doubted. The Court wrote:

> "The Court's lack of jurisdiction over the person of the defendant is immaterial. *Schiller* v. *Mit-Clip Co., Inc.*, 2 Cir. 180 F. 2d 654; *Internatio-*

Rotterdam, Inc. v. *Thomsen*, 4th Cir., 218 F. 2d 514; *Orion Shopping & Trading Co.* v. *United States*, 9 Cir. 247 F. 2d 755, *United States* v. *Welch*, D. C. 151 F. Supp. 899; *Petroleum Financial Corp* v. *Stone*, D. C. 116 F. Supp. 426."

Amerio Contact Plate Freezers, Inc. v. *Knowles*, 274 F. 2d 590, 591.[15]

The case of *Internatio-Rotterdam, Inc.* v. *Thomsen*, *supra*, is an admiralty decision which likewise may not be relied upon. This Court has only recently recognized that a distinction is to be made between civil actions such as the action at bar and cases brought in admiralty. See and "Cf." *Hoffman* v. *Blaski*, 363 U. S. 335 (1960), and *Continental Grain Co.* v. *Barge*, FBL—585, 364 U. S. 19, 21-22 (1960). The reasons underlying the different treatment of transfers in civil actions and admiralty cases were recognized by this Court therein. Furthermore, the difficulty of acquiring jurisdiction over a defendant whose ship may be located on the high seas for a period extended by the Statute of Limitations justifies the distinction.[16]

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[15] Note that *United States* v. *Welch*, 151 F. Supp. 899 (S. D. N. Y. 1957) relied on the *Schiller* case. *Petroleum Financial Corp* v. *Stone*, 116 F. Supp. 426 (S. D. N. Y. 1953) relied likewise on the *Schiller* case, although the District Court had "serious doubts upon the matter" (pp. 427, 429); *Orion Shipping & Trading Company* v. *United States*, 247 F. 2d 755, (9th Cir. 1957) is an admiralty decision which is patently inapplicable because the transferor court had personal jurisdiction over the defendant (see concurring opinion, page 758). Furthermore, appellee in the *Amerio Contact* case conceded in its brief that appellant's reliance on the *Schiller* case was correct but argued that transfer was improper because the court had not obtained jurisdiction over the subject matter. (Appellee's brief on appeal to the Court of Appeals for the District of Columbia, No. 15,150, pp. 12-13, 15.)

[16] See Note 68 Harv. L. Rev. 1069 (1955).

Accordingly it must be assumed that the Court of Appeals for the District of Columbia will no longer apply the reasoning of *Amerio Contact Plate Freezers, Inc. v. Knowles*, *supra*, inasmuch as it misconstrued the *Schiller* case and also improperly relied upon decisions in admiralty.[17] At least until such time that the Court of Appeals for the District of Columbia or of another Circuit expresses disagreement with the decisions of the Second and Third Circuits, no real conflict among the Circuits can presently be said to exist. For the foregoing reasons the petition at bar presents no question concerning the operation of the Federal judicial system requiring review. The petition should be denied.

CONCLUSION

The petition for certiorari to the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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[17] The decision in *Hayes v. Vermont*, 179 F. Supp. 818 (D. C. 1960) relies upon the Court's earlier decision in *Amerio Contact Plate Freezers, Inc.*, *supra* and on *Pocahontas Kolbed Fuel Inc. v. Thomson*, *supra* note Judge Bazelon in a concurrence relied solely on the *Amerio Contact Plate Freezers* decision. Accordingly the *Hayes* decision suffers from the same infirmities as the *Amerio Contact Plate Freezers* decision.

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 101.

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit.

BRIEF FOR PETITIONER.

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International Printing Co., Inc., Phila., Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Statement of the Case	3
Summary of Argument	5
Argument	6
I. The Decision of the Court of Appeals Imposes an Unwarranted Restriction Upon the Application of Section 1406(a)	6
II. The Restriction Imposed by the Court of Appeals Upon the Application of Section 1406(a) Is Unduly Burdensome	11
Conclusion	15

TABLE OF CASES CITED.

	Page
Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F.2d 590 (D.C. Cir. 1960)	7
Camp v. Gress, 250 U.S. 308 (1919)	6
Georgia v. Brailsford, 2 U.S. (2 Dal.) 402 (1792)	9
Gold v. Griffith, 190 F. Supp. 482 (N.D. Ind. 1960)	14
Goldlawr, Inc. v. Heiman, 273 F.2d 729	5
Hayes v. Livermont, 279 F.2d 818 (D.C. Cir. 1960)	7
Hohensee v. News Syndicate, Inc., 286 F.2d 527 (1961)	7
Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955)	6, 7, 9, 10, 14
Irwin v. Dixon, 50 U.S. (9 How.) 10 (1850)	9
Lambur v. Yates, 148 F.2d 137 (8th Cir. 1945)	6
Lumbermens Mut. Cas. Co. v. Mohr, 87 F. Supp. 727 (S.D. Tex. 1949)	7
Orion Shipping & Trading Co. v. United States, 247 F.2d 755 (9th Cir. 1957)	7
Radovich v. National Football League, 352 U.S. 445	14
Schiller v. Mit-Clip Co., 180 F.2d 654 (1950)	7
Schoen v. Mountain Producers Corp., 170 F.2d 707 (3d Cir. 1948)	6
Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1871)	6
United States v. Shubert, Civil Action 56-72, District Court for the Southern District of New York (1956 Trade Cases ¶ 68, 272)	3

STATUTES AND AUTHORITIES CITED.

	Page
Clayton Act, 38 Stat. 736:	
Section 4, 15 U.S.C. § 15	4, 14
Section 5(b), 15 U.S.C. § 16(b)	3, 10, 13, 14
Section 12, 15 U.S.C. § 22	2, 4, 12, 14
Federal Rules of Civil Procedure:	
Rule 3	10
Rule 25(a)(1)	4
Rule 54(b)	5
Rule 65(b)	9
Interlocutory Appeals Act, 28 U.S.C. § 1292(b)	5
Judicial Code:	
Section 1404(a), 28 U.S.C. § 1404(a)	11
Section 1406(a), 28 U.S.C. § 1406(a)	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
1 Moore, Federal Practice ¶ 0.146(5) (2d ed. 1960)	7, 14
2 Moore, Federal Practice ¶ 3.07(5) (2d ed. 1960)	10
Sherman Antitrust Act:	
Section 1, 15 U.S.C. § 1	3
Section 2, 15 U.S.C. § 2	3
Senate Report No. 303, 81st Cong., 1st Sess., U.S. Code Cong. Serv. 1253 (1949)	8
15 U.S.C. § 77(v)(a)	12
15 U.S.C. § 78aa	12
15 U.S.C. § 79y	12
15 U.S.C. § 80a-43	12
15 U.S.C. § 1222	12
28 U.S.C. §§ 1391(a) and (b)	11
28 U.S.C. § 1391(c)	12
28 U.S.C. § 1395(a)	12
28 U.S.C. § 1400(a)	12
29 U.S.C. §§ 160(e), (f), (j)	12
45 U.S.C. § 56	12

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit (R. 103-20) are reported at 288 F.2d 579. The opinion of the United States District Court for the Southern District of New York (R. 60-66) is found at 175 F. Supp. 793. The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 25-45) is found at 169 F. Supp. 677.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 21, 1961 and the petition for writ of certiorari was filed on May 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED.

Section 1406(a) of 28 U.S.C. provides as follows:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Section 12 of the Clayton Act, 38 Stat. 736, 15 U.S.C. § 22 provides as follows:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

QUESTION PRESENTED.

In a private antitrust action instituted by petitioner in the Eastern District of Pennsylvania, the District Court determined that venue was improper as to the defendant-respondents, and pursuant to 28 U.S.C. § 1406(a) severed and transferred the action as to them to the Southern District of New York where venue was proper.

The District Court for the Southern District of New York dismissed the action as against respondents for lack of jurisdiction upon the ground that the District Court for the Eastern District of Pennsylvania did not have personal jurisdiction over them and, therefore, had no power to

order the transfer. The Court of Appeals for the Second Circuit affirmed.

Did the District Court for the Eastern District of Pennsylvania, which had jurisdiction over the subject matter of the present action, have the power to transfer the case for improper venue under 28 U.S.C. § 1406(a), without having obtained personal jurisdiction over the transferred respondents?

STATEMENT OF THE CASE.

This is a private antitrust action brought pursuant to Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, against Jacob Shubert and several other persons and corporations identified with the Shubert interests in the legitimate theatre business. Petitioner, which operates a legitimate theatre in the City of Philadelphia, alleged injury to its business as a result of defendant's nation-wide monopoly and conspiracy unreasonably to restrain commerce in the legitimate theatre business, and sought treble damages and an injunction (R. 13-17).[1] The action was instituted by petitioner in the District Court for the Eastern District of Pennsylvania on October 17, 1956, within one year after the entry of the Consent Decree in *United States v. Shubert*, Civil Action 56-72, District Court for the Southern District of New York (1956 Trade Cases ¶ 68, 272), in order to secure the benefits of Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), providing for the tolling of the statute of limitations during the pendency of a Government antitrust action.

Service was originally made upon all defendants at the Shubert's Philadelphia office (R. 18-19). Subsequently, re-

1. A second complaint with almost identical allegations, but which added certain defendants not here involved and extended the period for which damages were sought, was filed on February 18, 1957 (R. 21-25). At the same time, petitioner amended the original complaint to assert the extended damage period. The two actions were consolidated in the Southern District of New York after transfer (R. 97), and will be treated as one case for the purpose of this Brief.

spondents Select Operating Corporation and United Booking Office, Inc. were also served in New York City by means of alias summonses, as provided by Section 12 of the Clayton Act, 15 U.S.C. § 22 (R. 19-20).

Respondents, as well as other defendants, filed motions to dismiss the present action for lack of jurisdiction and for improper venue, and to quash the return of service, claiming that they resided and transacted business only in New York City. The District Court for the Eastern District of Pennsylvania denied the motions as to some of the defendants, but as to respondents and others it held that venue in the Eastern District of Pennsylvania was improper under Sections 4 and 12 of the Clayton Act, 15 U.S.C. § 15 and 22, upon the grounds that these defendants (a) did not reside, (b) have agents, or (c) transact business in the Eastern District of Pennsylvania (R. 25-45).

However, instead of dismissing the case against these defendants, the District Court for the Eastern District of Pennsylvania, "in the interest of justice", transferred the present action as against them to the Southern District of New York, pursuant to Section 1406(a) of the Judicial Code (R. 46-47).

After transfer was effected, respondents once again moved to dismiss the present action for lack of jurisdiction (R. 68-69).[2] On January 27, 1960 the District Court for

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2. At the same time, petitioner moved to substitute as defendants the Executors of the Estate of Marcus Heiman (R. 59-60). The latter had died while the District Court for the Eastern District of Pennsylvania was considering the motions to dismiss.

Both courts below held that the District Court for the Eastern District of Pennsylvania had no power to transfer the case as to Marcus Heiman as well as the corporate respondents. They also held that the said Executors could not be substituted pursuant to the Federal Rule of Civil Procedure 25(a)(1). Petitioner did not seek review of this latter holding.

The remaining transferred defendants, Sylvia W. Golde, Milton Shubert and William Klein did not move to dismiss the present action and it is pending against them in the District Court for the Southern District of New York.

the Southern District of New York granted the said motion, holding that the respondents were not properly served while the case was pending in the Eastern District of Pennsylvania and that, therefore, the said District Court had no power to transfer the case (R. 60-67). The Court of Appeals for the Second Circuit affirmed (R. 103-20).[3] Circuit Judge Moore wrote the majority opinion, with Circuit Judge Waterman concurring; Circuit Judge Hincks dissented.

A writ of certiorari to the Court of Appeals for the Second Circuit was applied for upon the grounds that the decision of the Court of Appeals involved an important question of federal law, and conflicted with decisions of the Court of Appeals for the District of Columbia and for the Fourth and Ninth Circuits. Certiorari was granted on October 9, 1961 (R. 121).

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals which holds that the District Court for the Eastern District of Pennsylvania had no power to transfer the instant case for improper venue because it lacked personal jurisdiction over the respondents, reads into Section 1406(a) of the Judicial Code a restriction: (1) which is not expressed in the statute or justified by its legislative history; (2) which is erroneously based upon the view that there is an inherent lack of power in the federal courts to take such action; and (3) which violates the purposes underlying the enactment of Section 1406(a) and the broad venue provisions of other statutes in connection with which Section 1406(a) would be used.

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3. The appeal was taken pursuant to the Interlocutory Appeals Act, 28 U.S.C. § 1292(b). An earlier appeal was held to be improperly taken pursuant to Federal Rule of Civil Procedure 54(b) (R. 98-100), but the Court of Appeals afforded petitioner an opportunity to proceed under Section 1292(b). *Goldlawr, Inc. v. Heiman*, 273 F.2d 729 (R. 101-102).

ARGUMENT.

I.

The Decision of the Court of Appeals Imposes an Unwarranted Restriction Upon the Application of Section 1406(a).

Section 1406(a) of the Judicial Code is an important statutory procedural provision. Its proper application is essential to the efficient operation of the federal judicial system. In cases such as the present one, where venue has been laid in the wrong district, Section 1406(a), as amended,[4] authorizes the district court to dismiss the action or "in the interest of justice" to transfer the case to a district where venue is proper. Prior to the enactment of this provision in 1948, the court was required to dismiss the case.[5] Section 1406(a), by permitting the federal courts in a proper case to avoid the harsh result of dismissal, establishes a rule which is "in accord with modern standards of procedure, the purpose of which is to get away from time-consuming and justice-defeating technicalities."[6]

Section 1406(a) is a remedial statute and as such should be broadly construed.[7] In petitioner's view Section 1406(a) permits transfer, rather than dismissal, in all cases of improper venue where the district court has jurisdiction over the subject matter of the action, whether or not the court has acquired personal jurisdiction over the defendants

4. Section 1406(a), as originally enacted in 1948, merely authorized the district court to transfer an action in which venue was improperly laid. The 1949 amendment gave the district court discretion to *dismiss* or, in the interest of justice, to *transfer*.

5. *Camp v. Gress*, 250 U.S. 308, 316 (1919); *Schoen v. Mountain Producers Corp.*, 170 F.2d 707, 713 (3d Cir. 1948).

6. Chief Judge Parker in *Internatio-Rotterdam, Inc., v. Thomsen* 218 F.2d 514, 517 (4th Cir. 1955).

7. *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 504 (1871); *Lambur v. Yates*, 148 F.2d 137, 138 (8th Cir. 1945).

sought to be transferred. This is the holding of *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955); *Amerio Contact Plate Freezers, Inc. v. Knowles*, 274 F.2d 590 (D.C. Cir. 1960) [8] and *Hayes v. Livermont*, 279 F.2d 818 (D.C. Cir. 1960).[9] In all of these cases transfers were approved under section 1406(a) where venue had been laid in a wrong district, without regard to the existence in the transferor district court of personal jurisdiction over the transferred parties.

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8. The Court of Appeals for the Second Circuit refused to follow *Amerio* upon the ground that the Court of Appeals for the District of Columbia had misapplied the Second Circuit's own decision in *Schiller v. Mit-Clip Co.*, 180 F.2d 654 (1950) (288 F.2d at 584, R. 111-112). In the *Schiller* case, the Court of Appeals had dismissed an appeal from an order transferring a case under Section 1406(a), even though the transferor court did not have personal jurisdiction over the defendant. The majority opinion in the Court of Appeals herein stated that the defendant in *Schiller* had waived the jurisdictional defect and that the case therefore provides no basis for the holding in *Amerio* that a district court had power under Section 1406(a) to transfer a case without personal jurisdiction over the defendant.

The above analysis by the Court of Appeals herein would have merit only if the Court of Appeals for the District of Columbia had expressly stated, which it did not, that it was required to follow the decision of the Second Circuit in *Schiller*, irrespective of its own opinion in the matter. The holding in *Amerio*, however, represents the independent judgment of the Court of Appeals for the District of Columbia and the *Schiller* decision was correctly cited in support thereof. As Judge Hincks observed in his dissenting opinion, the Court of Appeals for the Second Circuit in *Schiller* "even if it did not pass upon the validity of a transfer made without personal jurisdiction, at least, allowed such a transfer to stand" (288 F.2d at 587, R. 117).

9. See also *Orion Shipping & Trading Co. v. United States*, 247 F.2d 755 (9th Cir. 1957); *Lumbermens Mut. Cas. Co. v. Mohr*, 87 F. Supp. 727 (S.D. Tex. 1949).

This is also the construction given Section 1406(a) by Professor James Moore, one of the drafters of the Judicial Code. 1 Moore, Federal Practice ¶ 0.146(5), p. 1910 at n. 21 (2d ed. 1960). The Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc.*, 286 F.2d 527 (1961) has taken the same position as the Court of Appeals herein.

The Court of Appeals herein has held that a district court cannot transfer a case for improper venue without possessing personal jurisdiction. This view is not justified by the legislative or other considerations set forth in that Court's opinion.

The sole restriction expressly placed by Congress upon the district court's exercise of its discretion to transfer under Section 1406(a) is that a case may be transferred only in the interest of justice. The requirement that, in addition, the district court have personal jurisdiction sought to be imposed by the Court of Appeals is neither found in the language of Section 1406(a) nor indicated as intended by the legislative history of the statute. Judge Hincks in his dissenting opinion observed that such a requirement is "wholly without Congressional sanction and reads into § 1406 a restriction on a salutary procedural provision which is not there. And a careful reading of its Congressional history does not suggest to me that such a restriction was intended" (288 F.2d at 589, R. 120).

The majority opinion of the Court of Appeals relied upon Senate Report No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949) as expressing "Congressional recognition" that personal jurisdiction was requisite to the application of Section 1406(a), although admitting that the document "does not explicitly address itself" to the issue (288 F.2d at 583, R. 109). This report recommended the passage of the 1949 amendment to Section 1406(a) permitting the district court to dismiss, as well as transfer, an action for improper venue, in order to avoid the abuses which could arise by allowing the court only to transfer such an action. The passage quoted in the opinion of the Court of Appeals cites as an example of such an abuse an instance where the plaintiff institutes suit in a district where defendant could be served but venue was improper so that transfer could be effected to a district where venue was proper but service not possible. It does not state that Section 1406(a) is applicable only in cases where the provi-

sion would be abused in this manner nor exclude its applicability in cases where no abuse can occur,[10] although personal jurisdiction is not acquired by the transferring court.

The Court of Appeals indicated that its holding was based upon an inherent lack of power in federal courts to affect the rights of parties without having first acquired personal jurisdiction over them. Federal courts, however, do have the power to act in a case (short of entering a final judgment) before acquiring personal jurisdiction in order to maintain the status quo. This power is exercised quite frequently in the issuance of *ex parte* restraining orders [11] at the commencement of an action in advance of service of process and was recognized as applicable to transfers pursuant to Section 1406(a) in *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955). The Court of Appeals in that case rejected the contention that no transfer order can be entered until personal jurisdiction has been acquired, observing (218 F.2d at 516):

> This argument fails, however, to distinguish between acquiring jurisdiction over the proceedings commenced before the court and acquiring jurisdiction over person or property; and it is the former, not the latter, with which we are concerned here. Certainly the court has no power to enter judgment against person or property until process has been duly served, . . . but it by no means follows that it is without power to enter orders in the cause which are necessary to the maintenance of the litigation itself. . . .

The Court of Appeals for the Fourth Circuit expressly based its decision in *Internatio* on Section 1406(a). None-

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10. See discussion at pp. 10-11, *infra*.

11. Although now included in Federal Rule of Civil Procedure 65(b), the power of the federal courts to restrain a party before service of process is of judicial origin. *Georgia v. Brailsford*, 2 U.S. (2 Dal.) 402 (1792); *Irwin v. Dixon*, 50 U.S. (9 How.) 10 (1850).

theless, the Court of Appeals for the Second Circuit attempted to distinguish that case upon the ground that admiralty actions are governed by special rules, permitting the district court to act without personal jurisdiction. In the course of his opinion in *Internatio*, Chief Judge Parker had stated that since the mere filing of a libel in admiralty stops the running of the statute of limitations even without seizure of the ship, there was a quasi-jurisdiction in the transferor court to enter orders appropriate to the issuance of process, including the transfer of the case to a district where service of process could be effected. The Court of Appeals herein intimated that this was not true in civil cases other than in admiralty and pointed out that Judge Parker had in his opinion distinguished *Internatio* in this respect from "a civil action based on diversity of citizenship" (288 F.2d at 585, R. 113).

The present action is not a diversity case, but one founded upon the federal antitrust laws. Pursuant to Section 5(b) of the Clayton Act, as amended, 15 U.S.C. § 16(b), a cause of action under the antitrust laws is not barred if "commenced" within the specified time. A civil action is commenced in the federal courts by "filing a complaint with the Court",[12] and the running of the statute of limitations is stopped thereby even though there has been no service of process.[13] Therefore, a rule similar to that relied upon by Judge Parker in *Internatio* as justifying a district court to transfer a case without personal jurisdiction does apply to the present case and, hence, *Internatio* is not distinguishable from the present case for the reason given by the Court of Appeals below.

The interpretation of Section 1406(a) espoused by petitioner will not result in harassment of defendants or otherwise violate traditional notions of "fair play". No transfer will take place unless "in the interest of justice", and no

12. Federal Rule of Civil Procedure 3.

13. See cases cited in 2 Moore, Federal Practice ¶ 3.07(5), p. 787, at n. 4 (2d ed. 1960).

final judgment will be entered until personal jurisdiction is acquired by the transferee court. Preventing the transfer itself because of lack of personal jurisdiction does not add to such protections already afforded a defendant, but merely places an unwarranted obstacle in the path of the plaintiff. Furthermore, since the transferee court is required to obtain personal jurisdiction over a transferred party, Section 1406(a) cannot be abused under petitioner's interpretation for the purpose of curing defects in jurisdiction as well as venue.

The Court of Appeals further erred, we submit, by relying in part upon the cases interpreting Section 1404(a) of the Judicial Code, 28 U.S.C. § 1404(a). Section 1404(a) is a codification of the common law doctrine of *forum non conveniens*, and in applying this doctrine it has been an historic requirement that the transferring court have personal jurisdiction over the defendant. In addition, Section 1404(a) permits transfer only when venue is proper—although inconvenient—and thus serves a totally different purpose than Section 1406(a). The cases under Section 1404(a), therefore, are not relevant to the interpretation of Section 1406(a).

We submit that the decision of the Court of Appeals imposes an unwarranted restriction upon the application of Section 1406(a) which is not supportable upon the grounds stated by the Court of Appeals in its opinion.

II.

The Restriction Imposed by the Court of Appeals Upon the Application of Section 1406(a) Is Unduly Burdensome.

The decision of the Court of Appeals nullifies the salutary purpose of Section 1406(a), by preventing its use in most of the instances where it would otherwise be applicable.

Under the general federal venue provisions, 28 U.S.C. §§ 1391(a) and (b), an action may be brought against an

individual defendant in the district where either the defendant or plaintiff resides. Since the residence of an individual can usually be determined without difficulty, any attempt to serve the defendant elsewhere would be a bad faith harassment of the defendant, and transfer would not be allowable "in the interest of justice", whether or not personal jurisdiction is acquired over the defendant.

Transfer should be permitted in those cases where determination of the proper district is difficult, and the plaintiff in good faith has made the wrong choice. This will occur most frequently in actions under the general [14] or special [15] venue, provisions in which Congress has expanded federal venue to permit suits against corporate defendants in any district where such defendant is "found" or "transacting business". Under these provisions the test for venue has become identical with the test for defendant's amenability to personal service. Therefore in any case where a court determines that venue has been improperly laid in

14. 28 U.S.C. § 1391(c).

15. In addition to Section 12 of the Clayton Act, 15 U.S.C. § 22, pursuant to which petitioner attempted to lay venue in the instant case, they are:

(a) 28 U.S.C. § 1395(a) (actions for recovery of fines, penalties or forfeitures).

(b) 28 U.S.C. § 1400(a) (actions under the Copyright Act).

(c) 15 U.S.C. § 77(v)(a) (actions under the Securities Act of 1933).

(d) 15 U.S.C. § 78aa (actions under the Securities Exchange Act of 1934).

(e) 15 U.S.C. § 79y (actions under the Public Utilities Companies Act).

(f) 15 U.S.C. § 80a-43 (actions under the Investment Companies Act).

(g) 15 U.S.C. § 1222 (actions under the Automobile Dealers Franchise Act).

(h) 29 U.S.C. § 160(e), (f), (j) (actions under the Taft-Hartley Act).

(i) 45 U.S.C. § 56 (actions under the Federal Employers' Liability Act).

reliance of one of these provisions, by necessity, personal jurisdiction will also be lacking.

Because of the problem of judicial definition of what activities constitute "doing business", it is not unlikely that a plaintiff may commence suit in a district with which he honestly, but incorrectly, believes the defendant has sufficient contacts to support venue and personal jurisdiction. In such a case the district court may make its determination adversely to the plaintiff only after a time-consuming inquiry into the defendant's activities, during which time the statute of limitations will have run, preventing a new action or barring recovery of a considerable portion of the damages. The decision of the Court of Appeals herein would require such case to be dismissed, leaving the plaintiff remediless, even though the district court determined that it was in the interest of justice to transfer to a district where venue was proper.

This result is particularly harmful, since actions instituted pursuant to statutes containing such expanded venue provisions constitute an important segment of federal litigation, both in amount and character. For the most part, such actions fall into areas where there is a Congressional policy to encourage and facilitate Government and private suits. It is submitted that by making Section 1406(a) inapplicable to these cases, the decision of the Court of Appeals herein imposes an undue restriction upon the scope of this provision.

The hardship such a decision can cause a plaintiff is illustrated in the instant case. Petitioner's complaint was filed in the Eastern District of Pennsylvania within one year of the entry of a Consent Decree in a Government suit alleging similar antitrust violations thereby entitling petitioner to the benefit of the tolling of the statute of limitations under Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b). Through no fault of the petitioner, however, the District Court's decision that venue was improper with respect to respondents was not rendered until after two years

had elapsed. By that time the larger part of the petitioner's claim was barred by the statute of limitations and, unless the transfer is sustained under Section 1406(a), will be unrecoverable without regard to the merits of such claim.

Petitioner's good faith in instituting the action in the Eastern District of Pennsylvania is demonstrated by the fact that the District Court upheld petitioner's contentions that some of New York's defendants were doing business through agents in Philadelphia, and only rejected them with respect to respondents after an extended study of the facts. Moreover, as Judge Hincks noted in his dissent (288 F.2d at 589, R. 119), there was nothing improper in the petitioner's attempting to prosecute its claim against all of the defendants in one action in its home forum.

It is submitted that in the light of this good faith and the liberal policy of Section 1406(a), the District Court for the Eastern District of Pennsylvania correctly decided that it was "in the interest of justice" to transfer the present action in order to avoid the elimination of a significant period of damages.[16] Neither respondents nor the courts below have questioned the propriety of the transfer on this ground.

The dismissal of petitioner's action, under these circumstances, is also contrary to Congressional policy, as demonstrated by liberal venue [17] and tolling [18] provisions, to facilitate the private antitrust suitor's prosecution of his claim against alleged antitrust violators. This Court has stated, *Radovich v. National Football League*, 352 U.S. 445, 454, that: "in the face of such policy this Court should not add requirements to burden the private litigant beyond

16. This view was expressed by Judge Hincks in his dissenting opinion. 288 F.2d at 589, R. 119. See also *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514, 517 (4th Cir. 1955); *Gold v. Griffith*, 190 F. Supp. 482 (N.D. Ind. 1960); 1 Moore Federal Practice ¶ 0.146(5), p. 1908, at n. 11 (2d ed. 1960).

17. Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22.

18. Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b).

what is specifically set forth by Congress in those [antitrust] laws." The decision of the Court of Appeals herein, by depriving private antitrust litigants of the procedural benefits of Section 1406(a) as a matter of law, unduly burdens such suitors without express Congressional authority.

A view more consistent with the liberal policies of both the antitrust laws and Section 1406(a) is expressed by Judge Hincks, who pointed out that avoidance of the elimination of a significant period of damages was in itself a reason "in the interest of justice" why the transfer should have been found proper (288 F.2d at 589, R. 119).[18]

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals affirming the dismissal of the transferred action as to respondents by the District Court for the Southern District of New York should be reversed.

Respectfully submitted,

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Brief of Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased, for Respondent Marcus Heiman

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INDEX

PAGE

Question Presented 1

Statement of the Case 2

ARGUMENT:

POINT I.—Petitioner voluntarily has stated to this Court that it is not seeking a review of the denial of its motions to substitute the Executors as party defendants. Accordingly the dismissals below must stand. The controversy before the Court is moot as to Marcus Heiman. As to him the writ of certiorari should be dismissed or the judgment below affirmed 5

POINT II.—The transfers violated traditional concepts of due process and were not in the interest of justice 9

Conclusion 14

APPENDIX 15

TABLE OF CASES CITED

American Book Co. v. Kansas, 193 U. S. 49 (1903) 8

Anderson v. Yungkau, 329 U. S. 482 (1946) 7, 9

Atherton Mills v. Johnson, 259 U. S. 13 (1921) ... 8

Automatic Radio Co. v. Hazeltine Research, 339 U. S. 827, 835-836 (1949) 8

PAGE

Banana Distributors Inc. v. United Fruit Co., —— F. Supp. ——, 1961 CCH Trade Cases, para. 69,973 (S. D. N. Y. 1961) 7

Brownlaw v. Schwartz, 261 U. S. 216 (1922) 8

Bus Employees v. Wisconsin Board, 340 U. S. 416 (1950) 8

Carpenters' Union v. Labor Board, 357 U. S. 93, 96-97 (1957) 7

Clarke v. Mathewson, 12 Pet. 164, 171 (U. S. 1838) 10

Commonwealth v. Pladas, 79 D. C. 235 (Pa. 1952) 10

Cover v. Schwartz, 133 F. 2d 541 (2nd Cir. 1942), *cert. denied* 319 U. S. 748 (1942) 8

Eagleton Mfg. Co. v. West, 2 Fed. 774, 779 (C. C. N. Y. S. D. 1880) 11

Ex Parte Slater, 246 U. S. 128, 133 (1917) 10

Goldlawr, Inc. v. Shubert, 169 F. Supp. 677 (E. D. Pa. 1958) 3, 4

Hart v. Blabey, 286 N. Y. 75, 39 N. E. 2d 230 (1941) 11

Hoffman v. Blaski, 363 U. S. 335 (1960) 13

Hohensee v. News Syndicate Inc., 286 F. 2d 527 (3rd Cir. 1961) 9, 10, 13

Internatio-Rotterdam, Inc. v. Thomsen, 218 F. 2d 514, 516 (1955) 10

Irvine v. California, 347 U. S. 128, 129-130 (1953) 7

Lawn v. United States, 355 U. S. 339, 362-363 (1957) 7

PAGE

Mills v. Green, 159 U. S. 651 (1895) 8

Mitchell v. Oregon Frozen Foods Co., 361 U. S. 231 (1959) 8

O'Brien v. Flynn, 228 App. Div. 704, 239 N. Y. S. 59 (1930) 10

Oil Workers Unions v. Missouri, 361 U. S. 363, 367 (1959) 8

Phillips v. New York, 362 U. S. 456 (1959) 8

Phillips Co. v. Dumas School District, 361 U. S. 376, 386 (1959) 7

Rice v. Sioux City Cemetery, 349 U. S. 70, 77-80 (1954) 8

Singer Mfg. Co. v. Wright, 141 U. S. 696 (1891) .. 8

Skilling v. Funk Aircraft Company, 173 F. Supp. 939 (W. D. Mo. 1959) 12

Trailmobile Co. v. Whirls, 331 U. S. 40, 48 (1946).. 7

Winkelman v. General Motors, 30 F. Supp. 112 (S. D. N. Y. 1939) 13

STATUTES AND AUTHORITIES CITED

1 AM. JUR., Abatement and Revival §159 (1936).. 10

1 C. J. S., Abatement and Revival, §161, Suppl. 1961, p. 33, n. 97.1 (1961) 13

PAGE

Federal Rules of Civil Procedure, Rule 25(a)(1) .. 6, 7

Rules of Supreme Court of United States (July 1, 1954), Rule 23, para. 1(c) 1, 7

15 U. S. C. §1 7

15 U. S. C. §22 9

28 U. S. C. §1404(a) 13

28 U. S. C. §1406(a) 5, 6, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 101

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

Brief of Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased, for Respondent Marcus Heiman

Question Presented

By virtue of the limited question presented for review by petitioner (Brief for Petitioner, pp. 2-3) and by virtue of petitioner's voluntary statement that it is not seeking a review of the denial of its motions to substitute the Morgan Guaranty Trust Company of New York, Executor, as party defendant in place of Marcus Heiman, deceased (Brief for Petitioner, p. 4, n. 2), the question presented with respect to respondent Marcus Heiman is—

> Should this Court either dismiss the writ of certiorari or affirm the judgment below as to Marcus Heiman because the proceeding is "moot" as to Marcus Heiman?[1]

[1] Rule 23, para. 1(c) of the Rules of this Court provides: "Only the questions set forth in the petition or fairly comprised therein will be considered by the Court."

Statement of the Case

The affirmance below was unanimous with respect to respondent Marcus Heiman (R. 115).

Petitioner filed its first complaint in the United States District Court for the Eastern District of Pennsylvania on October 17, 1956 (R. 1). Marcus Heiman died a resident and domiciliary of New York, New York on September 9, 1957. Morgan Guaranty Trust Company of New York and Asher Levy were issued letters testamentary by the Surrogate's Court of the County of New York, State of New York on October 1, 1957 (R. 70-72).[2]

Petitioner had knowledge of the death of Marcus Heiman almost immediately and was informed officially in January, 1958 (R. 80). Petitioner did not proceed to substitute the Executors in place of the decedent until some twenty (20) months after the death of Marcus Heiman and only *after* the transfer of the actions to the United States District Court for the Southern District of New York (R. 59; 71; 80).

On March 3, 1959, the date the United States District Court for the Eastern District of Pennsylvania ordered the actions transferred to the Southern District of New York, Marcus Heiman had been dead almost eighteen (18) months; the Executors had not been substituted as party defendants; there had been no appearance by the Estate of Marcus Heiman; no Court had acquired jurisdiction over Marcus Heiman or over the Executors; neither had been served personally with process; neither had submitted to the jurisdiction of the Court (R. 64-65); and the Eastern District Court had held that Marcus Heiman

[2] By intermediate decree of the Surrogate's Court dated June 15, 1960, Asher Levy was permitted to resign. Morgan Guaranty Trust Company of New York has continued as Executor.

neither resided, was not found, nor had an agent in Pennsylvania, and had held venue there improper as to him (R. 26-29). *Goldlawr, Inc.* v. *Shubert*, 169 F. Supp. 677, 679-682.

On two separate occasions, in October, 1956 and in February, 1957, petitioner directed the United States Marshal in Philadelphia to serve Marcus Heiman in Philadelphia by serving a woman in charge of the Shubert office at the Forrest Theatre at 209 Quince Street, Philadelphia, Pennsylvania (R. 19; appendix, p. 16, *infra*).[3] On the second occasion petitioner *at the same time* directed the United States Marshal in New York to serve an alias summons upon respondent, United Booking Office, Inc., of which Marcus Heiman was a Director, by serving Marcus Heiman at his business, 236 West 44th Street, New York, New York, or at his home 24 West 55th Street, New York, New York (R. 81-82).

In opposing the motions made on behalf of Marcus Heiman (as well as those made on behalf of the other defendants, including the present corporate respondents) to quash service and to dismiss for lack of jurisdiction

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[3] The motions on behalf of Marcus Heiman to quash service and to dismiss in connection with the October, 1956 return of service were filed November 26, 1956 (R. 1). The affidavit of Marcus Heiman, sworn to November 19, 1956 in support thereof stated: "* * * The Forrest Theatre offices on Quince Street, Philadelphia, are not my offices * * *" (R. 76-77).

Petitioner conceded below that this Philadelphia office was not the office of Marcus Heiman but was "the headquarters of the Shubert organization" (R. 81). See also Brief for Petitioner, p. 5: "Service was originally made upon all defendants at the Shubert's Philadelphia office". Marcus Heiman was not a Shubert. The purported service was not effective.

Petitioner has never at any time really contended that jurisdiction over Marcus Heiman was obtained (See R. 72—no opposition before the Eastern District Court; R. 94—letter to Judge Kraft; R. 107—no opposition below).

and for improper venue, petitioner made no effort whatsoever to sustain the purported service upon Marcus Heiman at Philadelphia or to sustain the Eastern District of Pennsylvania as a proper venue for him (R. 72). Although petitioner offered a voluminous affidavit, brief and voluminous documents in opposition to the motions, not one word was offered by petitioner to support the venue as to Marcus Heiman or the purported services upon him (R. 72).[4]

On December 22, 1958 Judge Kraft filed an opinion in both actions granting the motions of Marcus Heiman to dismiss for improper venue (R. 3; 8). *Goldlawr Inc.* v. *Shubert*, 169 F. Supp. 677, 679-682. On March 3, 1959 Judge Kraft, instead of dismissing the actions pursuant to his opinion, transferred the actions to the United States District Court for the Southern District of New York without having ruled upon the motions of Marcus Heiman to dismiss for lack of personal jurisdiction or without having substituted the Executors as party defendants (R. 46; 61, 64-65).

After transfer to the Southern District of New York, petitioner served notices of motion dated May 11, 1959 upon the Executors to substitute them as party defendants in place of Marcus Heiman (R. 59). The Executors appeared to oppose the motions for substitution and by notice of motion dated June 4, 1959 cross-moved for the dismissal of the actions (R. 68-82).

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[4] Had petitioner originally instituted the actions against Marcus Heiman (as well as against many of the other defendants) in New York, much of what has transpired would have been voided. No question has ever been raised as to Marcus Heiman not being amenable to process in New York prior to his death. Note also that petitioner's several complaints allege in substance that the center of the alleged conspiracy was in New York and that it was from there that the alleged injuries were allegedly inflicted (R. 15-17; R. 21-25; R. 47-53; R. 53-59).

The Southern District Court *denied* the motions for substitution and granted the Executors' motion to dismiss (R. 64-67; 97).[5] The Court of Appeals for the Second Circuit unanimously affirmed the order as to Marcus Heiman (R. 115; 121). Petitioner is not seeking a review of the holding that the Executors cannot be substituted (Brief for Petitioner, p. 4, n. 2).

Immediately after the dismissal below petitioner instituted a new action on August 20, 1959 naming as defendants the Executors of the Estate of Marcus Heiman and the two corporate respondents (Civil Action 149-349, United States District Court for the Southern District of New York).[6]

ARGUMENT

POINT I

Petitioner voluntarily has stated to this Court that it is not seeking a review of the denial of its motions to substitute the Executors as party defendants. Accordingly the dismissals below must stand. The controversy before the Court is moot as to Marcus Heiman. As to him the writ of certiorari should be dismissed or the judgment below affirmed.

Even should this Court hold that the District Court for the Eastern District of Pennsylvania had the power to transfer under 28 U. S. C. §1406(a), without having obtained personal jurisdiction over the respondents, the actions below were properly dismissed as to Marcus Hei-

---

[5] "* * * it is hereby ordered and decreed: * * * That the motion of the Executors . . . to dismiss as to Marcus Heiman . . . is granted, and that the motion of plaintiff to substitute the Executors . . . as party defendants in place of Marcus Heiman be denied."

[6] Petitioner could have brought this action almost two years earlier.

man. As to him there was no substitution of proper parties; the Courts below denied petitioner's application for substitution pursuant to Rule 25(a)(1) of Federal R. Civ. Proc.; petitioner has acquiesced in said rulings and has affirmatively abandoned any review thereof.

In its petition for a writ of certiorari, petitioner limited its request for review to a single question—namely:

> "Did the District Court for the Eastern District of Pennsylvania, which had jurisdiction over the subject matter of the present action, have the power to transfer the case for improper venue under 28 U. S. C. §1406(a), without having obtained personal jurisdiction over the transferred respondents?"

Petitioner did not request a review of the denial of its motions for substitution. In addition, no argument was set forth in its petition with respect thereto. Accordingly, in opposing the petition, Morgan Guaranty Trust Company of New York as Executor, on behalf of Marcus Heiman argued that the petition should be denied as to Marcus Heiman since as to him the controversy was moot.

Any doubt that this Court may have entertained as to the controversy being moot must now be positively dispelled by petitioner's admissions subsequent to the granting of certiorari.

Petitioner again fails to present any argument in its brief with respect to the issue of substitution; nor does it deny that the controversy is moot as to Marcus Heiman, as was argued in opposition to the petition; further, petitioner expressly states to this Court:

> "• • • they (the Courts below) also held that the said Executors could not be substituted pursuant to the Federal Rules of Civil Procedure 25(a)(1).

> Petitioner did not seek review of this latter holding." (Brief for Petitioner, p. 4, n. 2.)

The propriety of the denial of the motions for substitution has not been presented to the Court and, accordingly, is not before it for review. Supreme Court Rules 23, para. 1(c); *Phillips Co.* v. *Dumas School District*, 361 U. S. 376, 386 (n. 12); *Carpenters' Union* v. *Labor Board*, 357 U. S. 93, 96-97 (n. 1); *Lawn* v. *United States*, 355 U. S. 339, 362-363 (n. 16); *Irvine* v. *California*, 347 U. S. 128, 129-130; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48.

Because the Courts below have denied the substitution of the Executors, the dismissals below must stand. Rule 25(a)(1) of the Federal Rules of Civil Procedure is clear and explicit:

> "If a party dies and the claim is not thereby extinguished,[7] the Court within two years after the death *may order* substitution of the proper parties. *If substitution is not so made, the action shall be dismissed as to the deceased party* * * *"[8] (emphasis ours)

By not seeking a review of the denial of its motions for substitution and by having affirmatively acquiesced in said

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[7] Although not passed upon below, the Executor does not concede that the claim at bar survived. In view of petitioner's position, no argument is being presented with respect thereto.

The question as to whether a claim (such as at bar) made in a private anti-trust action for treble damages under 15 U. S. C. §1 *et seq.*, is extinguished, has never been passed upon by this Court. The trend of lower Court decisions has been to hold that the claim has not been extinguished but to disallow treble damages. See *Banana Distributors, Inc.* v. *United Fruit Co.*, ... F. Supp. ...., 1961 CCH Trade cases ¶69,973 (S. D. N. Y. 1961).

[8] Even within the two year period, substitution is not an absolute right. *Anderson* v. *Yungkau*, 329 U. S. 482, 485-486.

ruling, petitioner has caused the controversy between it and respondent Marcus Heiman to end. The issue as to whether the Eastern District Court had the power to transfer without having had personal jurisdiction of the respondents is no longer material to the disposition of the controversy between petitioner and Marcus Heiman. An opinion by this Court on the question presented by petitioner for review cannot affect the controversy that once existed. The matter before the Court as to respondent Marcus Heiman is moot. *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 367; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416, 418; *Automatic Radio Co.* v. *Hazeltine Research*, 339 U. S. 827, 835-836; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Atherton Mills* v. *Johnson*, 259 U. S. 13; *American Book Co.* v. *Kansas*, 193 U. S. 49; *Mills* v. *Green*, 159 U. S. 651, 653-654; *Singer Mfg. Co.* v. *Wright*, 141 U. S. 696; *Cover* v. *Schwartz*, 2 Cir., 135 F. 2d 541, *cert. denied* 319 U. S. 748.

As to Marcus Heiman the writ of certiorari should be dismissed,[9] or in the alternative the judgment below affirmed.

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[9] It is not unusual for this Court to dismiss a writ of certiorari as having been improvidently granted. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 77-80 *and particularly* n. 2 at pp. 78-79; See also *Phillips* v. *New York*, 362 U. S. 456; *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U. S. 231.

POINT II

The transfers violated traditional concepts of due process and were not in the interest of justice.[10]

The orders of transfer had an important and substantial affect on the rights of the parties to the actions and on the rights of the Estate of Marcus Heiman. The extent to which, or the period of time for which the Estate of Marcus Heiman was to be exposed to a claim for damages involved a serious question affecting the orderly and expeditious administration of the Estate. "Cf." *Anderson* v. *Yungkau*, 329 U. S. 482, 485-486.[11]

Yet, at the time the motions for transfer were made, argued and decided the Estate of Marcus Heiman was not before the Court. The Executors had not been substituted, were not parties to the actions, and were not given the opportunity to be heard and to argue that the transfers would not be in the interest of justice. No papers of any nature had been served upon them. Such a procedure cannot be sustained.

The opinion of the Court of Appeals For the Third Circuit in *Hohensee* v. *News Syndicate Inc.*, 286 F. 2d 527 at 530 is most applicable—

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[10] At the outset it should be noted that Judge Hincks agreed that the order below as to Marcus Heiman should be affirmed (R. 115). It should be further noted that any discussion of Section 12 of the Clayton Act, 15 U. S. C. §22 (R. 118) has no relevance to the transfer as to Marcus Heiman and that the dissent of Judge Hincks as well as a substantial part of petitioner's argument if not all of it are directed to sustaining the transfer as to the corporate respondents only.

[11] The real issue at bar is, "the elimination of a significant period of damages." Brief for petitioner, pp. 13-14. Thus the orders of transfer were not simply a preliminary procedural device necessary to the maintenance of the litigation itself". *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F. 2d 514, 516, Parker C. J.

> "We think that a close reading of the section (28 U. S. C. §1406(a)) will make it clear that it is available to a plaintiff only where the court has jurisdiction over the person of the defendant. Subsection (a) provides that venue can be perfected by a transfer to another forum only if it be determined that it is in the 'interest of justice' to do so. *Before such determination can be made, however, both parties of necessity must at least have an opportunity to be heard.*" [12] (Emphasis added.)

The death of Marcus Heiman on September 9, 1957 terminated his limited presence before the Court. The Court could not proceed without the substitution of proper parties. *Ex Parte Slater*, 246 U. S. 128.[13] *Clarke* v. *Mathewson*, 12 Pet. 164, 171 (U. S. 1838); *Commonwealth* v. *Pladas*, 79 D & C 235 (Pa. 1952); *O'Brien* v. *Flynn*, 228 App. Div. 704, 239 N. Y. S. 59; 1 AM. JUR., Abatement and Revival, §159, p. 105 (1936); the attorney who had acted for Marcus Heiman during his lifetime no longer

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[12] The attempted analogy by petitioner of the *ex parte* restraining order (Brief for petitioner, p. 9) is readily distinguishable. Such an order is effective for a limited period of time *only* after service upon the party to be affected, who has an opportunity to appear before the issuing court, oppose it and move to have it dissolved. At bar the order of transfer was effective immediately without service upon the Executors, upon whom no papers of any nature were served. If petitioner's position at bar is sustained by this Court, thereby permitting transfer without jurisdiction, such a party as the Executor at bar would be foreclosed forever from opposing the transfer. It is very doubtful that after such a decision by this Court that a transferee court would ever review the propriety of the transfer to determine whether the transferor court, a court of coordinate jurisdiction, in the exercise of its discretion transferred "in the interest of justice".

[13] At 246 U. S. 133, ". . . The death of one of the parties having an interest in the fund operated to suspend the proceedings for its apportionment until someone legally capable of asserting and defending that interest should either come or be brought into the suit in the place of the deceased."

represented the decedent. *Eagleton Mfg. Co.* v. *West*, 2 Fed. 774, 779 (C. C. S. D. N. Y. 1880); *Hart* v. *Blabey*, 286 N. Y. 75, 39 N. E. 2d 230.

Petitioner argues that its position must be sustained in order to preserve the efficient operation of the federal judicial system (Brief for Petitioner, p. 6). Yet, petitioner's own conduct in proceeding with this litigation as to Marcus Heiman has been the very opposite of efficient.[14] The record shows that petitioner had no reasonable basis for believing that it could effect proper service on Marcus Heiman within the jurisdiction of the Eastern District Court of Pennsylvania and for believing that venue there was proper as to him.

Even by petitioner's own standards the transfer as to Marcus Heiman was not in the interest of justice.[15] The record shows that petitioner knew Marcus Heiman resided in New York, knew that his business was there and knew that the Shubert office in Philadelphia was not

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[14] Petitioner claims also that it has acted in good faith and is prejudiced by the dismissal because a large part of its claim would be barred by the statute of limitations through no fault of its own (Brief for Petitioner, pp. 13-14). The issue as to whether petitioner instituted these actions as to Marcus Heiman and prosecuted them in good faith was not reached below although argued by the Executor (Brief for Morgan Guaranty Trust Company of New York, as Executor, in the Court of Appeals, Point III). The discussion of petitioner's good faith by Judge Hincks (R. 119) has no applicability to Marcus Heiman as His Honor was dissenting as to the corporate respondents only (R. 115).

[15] "Since the residence of an individual can usually be determined without difficulty, any attempt to serve the defendant elsewhere would be a bad faith harassment of the defendant, and transfer would not be allowable 'in the interest of justice', whether or not personal jurisdiction is acquired over the defendant.

"Transfer should be permitted in those cases where determination of the proper district is difficult, and the plaintiff in good faith has made the wrong choice" (Brief for Petitioner, p. 12).

Heiman's office. Notwithstanding, petitioner on two separate occasions directed service to be made on Marcus Heiman by serving the woman in charge of the Shubert office in Philadelphia. On the second occasion petitioner at the same time directed the Marshal in New York to serve an alias summons on respondent, United Booking Office, Inc., by serving Marcus Heiman at his home or at his business in New York (p. 3, *supra*).

The most cogent evidence, however, of petitioner's bad faith in instituting these actions as to Marcus Heiman in the Eastern District of Pennsylvania is petitioner's complete failure to offer one fact or one argument to the Eastern District Court to sustain venue or jurisdiction as to Marcus Heiman. Petitioner in opposing the motions of all the defendants to quash service, and to dismiss for lack of jurisdiction and for improper venue submitted a thirty-two page affidavit by its attorney, a twelve page brief and voluminous documents and exhibits. Not one word referred to Marcus Heiman or to the claim that the Court had jurisdiction over him and that venue was proper as to him.

Petitioner argues that it should not be prejudiced by the two years which elapsed between argument and the decision in the Eastern District Court. As to Marcus Heiman petitioner was never prejudiced by this delay since petitioner in effect offered no opposition to the motions made on his behalf. Having not even attempted to sustain jurisdiction and venue as to Heiman, petitioner could have expected only one result—namely dismissal as to Heiman.[16]

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[16] "Cf." *Skilling* v. *Funk Aircraft Company*, 173 F. Supp. 939 (W. D. Mo. 1959). Held: It was not in the interest of justice to transfer even for the purpose of interrupting the running of the Statute of Limitations where plaintiff merely assumed he could obtain service on the defendant in the District.

This foregoing conduct of petitioner together with its unexcusable and unreasonable delay in moving to substitute the Executors,[17] can leave no doubt that the judgment of dismissal below as to Marcus Heiman was proper.

Morgan Guaranty Trust Company of New York as Executor in further urging the affirmance of the judgment below also joins in the argument presented by the corporate respondents, namely—

> that section 1406(a) must be construed strictly, *Hoffman* v. *Blaski*, 363 U. S. 335; that the decisions below and that of the Court of Appeals for the Third Circuit in *Hohensee* v. *News Syndicate Inc.*, 286 F. 2d 527, are supported by the legislative history of Section 1406(a) and by the obvious intent of Congress to make personal jurisdiction the *sine qua non* of transfers under both Sections 1404 and 1406 (28 U. S. C. §§1404, 1406); that these decisions are not unwarrantedly restrictive or burdensome on litigants; and that the decisions relied upon by petitioner are distinguishable and inapplicable.

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[17] On the death of Marcus Heiman, the burden of substituting the proper party rested on petitioner. *Winkelman* v. *General Motors*, 30 F. Supp. 112, 113 (S. D. N. Y.); 1 C. J. S., Abatement and Revival §161, Suppl. p. 33, n. 97.1 (1961).

CONCLUSION

The writ of certiorari should be dismissed as the controversy before the Court as to Marcus Heiman is moot. In the alternative the judgment below should be affirmed.

Respectfully submitted,

AARON LIPPER,
Counsel for Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased,

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APPENDIX

Summons and Return in Goldlawr, Inc. v. Jacob J. Shubert, et al., E. D. Pa. No. 22,092 omitted from transcript of record by inadvertence; found at pages 11 and 18 of the Record on Appeal of Court of Appeals for the Second Circuit.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

..... DIVISION

Civil Action File No. 22,092

GOLDLAWR, INCORPORATED,

Plaintiff,

v.

JACOB J. SHUBERT and LAWRENCE SHUBERT LAWRENCE, MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, individually and as Trustees of the Estate of LEE SHUBERT, Deceased, individually and as co-partners, JOHN SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, SELECT OPERATING CORPORATION, MODERN THEATRE CORPORATION, BARRYMORE THEATRE CORPORATION and L. A. B. AMUSEMENT CORPORATION,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Harold E. Kohn, Esq., plaintiff's attorney, whose address is 2035 Fidelity Philadelphia Trust Bldg., Philadelphia 9,

Pa., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Gilbert W. Ludwig, Clerk of Court.
Roland J. Greenwood, Deputy Clerk.

[Seal of Court]

Date: February 18, 1957

[Stamp—Dept. of Justice—Received Feb. 19, 1957—U. S. Marshal, Phil., Pa.]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 5th day of March 1957, I received this summons and served it together with the complaint herein as follows:

on 3-5, 1957, upon Marcus Heiman ~~personally~~, at 209 So. Quince St., Phila, Pa by handing ~~him~~ her ~~or them~~ copies thereof, and making contents of said service known to ~~him~~ her ~~or them~~; or on 3-5, 1957 upon Mrs. C. E. Richman woman in charge of the office of the place of business designated by Plaintiffs attorney for service upon him.

Marshalls Fees:

Travel	$....
Service	$2.00
	$2.00

William A. O'Brien, U. S. Marshal, E. D. of Pa. By:
Thomas J. Hasson, Deputy U. S. Marshal
Filed March 11, 1957

Office-Supreme Court, U.S.
FILED
JAN 15 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

No. 101.

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENTS SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

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TABLE OF CONTENTS.

	Page
OPINIONS BELOW	1
QUESTION PRESENTED	2
STATUTE SOUGHT TO BE INVOKED	2
COUNTER STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. The Construction of Section 1406(a) for Which Petitioner Contends Imputes Irrationality to Congress	11
II. Applicable Decisions of This Court Require That Section 1406(a) Be Strictly Construed	14
III. The Legislative History of the Statute Demonstrates That Personal Jurisdiction Is a Prerequisite to Transfer	17
IV. The Decisions Upon Which Petitioner Relies Are Either Inapplicable or the Proposition for Which They Are Cited Was Not in Issue	19
V. The Decisions Below Impose No Restrictions Upon the Statute Nor Hardship Upon Petitioner	22
CONCLUSION	26

TABLE OF CASES CITED.

	Page
Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F. 2d 590 (D. C. Cir. 1960)	20, 21
Anderson v. Watt, 138 U. S. 694 (1891)	14
In re Associated Gas & Electric Co., 83 F. 2d 734 (2nd Cir. 1936)	15
Billings Utility Co. v. Federal Reserve Bank of Minneapolis, 40 F. Supp. 309 (D. Mont. 1941)	15
Brown v. Heinen, 61 F. Supp. 563 (D. Minn. 1945)	15
Bruner v. Republic Acceptance Corporation, 191 F. Supp. 200 (E. D. Ark. W. D. 1961)	6
Camp v. Gress, 250 U. S. 308 (1919)	15
Dennis v. Galvanek, 171 F. Supp. 115 (M. D. Pa. 1959)	23
Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359 (1927)	24
Felchlin v. American Smelting and Refining Company, 136 F. Supp. 577 (S. D. Cal. 1955)	15
Foster-Milburn Co. v. Knight, 181 F.2d 949 (2nd Cir. 1950)	13
Gold v. Griffith, 190 F. Supp. 482 (N. D. Ind. 1960)	23
Goldlawr v. Shubert, 169 F. Supp. 677 (E. D. Pa. 1958)	4, 24
Goldlawr v. Shubert, 3 Fed. Rules Serv. 2d, Case 3.2 (S. D. N. Y. 1960)	6, 7
Hanford v. Davies, 163 U. S. 273 (1896)	14
Hayes v. Livermont, 279 F. 2d 818 (D. C. Cir. 1960)	21
Huffman v. Blaski, 363 U. S. 335 (1960)	9, 12, 16
Hohensee v. News Syndicate, Inc., 286 F. 2d 527 (3rd Cir. 1961)	14, 18, 19, 21
Internatio-Rotterdam, Inc. v. Thomsen, 218 F. 2d 514 (4th Cir. 1955)	21, 22
Jacobson v. Indianapolis Power & Light Company, 163 F. Supp. 218 (N. D. Ind. 1958)	23

TABLE OF CASES CITED (Continued).

	Page
Kibler v. Transcontinental & Western Air, 63 F. Supp. 724 (E. D. N. Y. 1945)	15
Norris v. Yates, 109 F. Supp. 436 (W. D. Pa. 1953)	23
Norwood v. Kirkpatrick, 349 U. S. 29 (1955)	15
Olberding v. Illinois Central R. Co., 346 U. S. 338 (1953)	23
Orion Shipping and Trading Company v. United States, 247 F. 2d 755 (9th Cir. 1957)	19, 23
Riley v. Union Pacific R. Co., 177 F. 2d 673 (7th Cir. 1949), cert. den. 338 U. S. 911 (1950)	13
Sheldon v. Sill, 49 U. S. (8 How.) 440 (1850)	14
Sherck v. Hagan, 135 F. Supp. 293 (D. N. D. 1955)	23
Squires v. The Ionian Leader, 100 F. Supp. 829 (D. N. J. 1951)	23
Sullivan v. Behimer, 363 U. S. 351 (1960)	12, 16
Sullivan v. Kilgore Mfg. Co., 100 F. Supp. 983 (E. D. N. Y. 1951)	23
United Merchants & Manufacturers, Inc. v. United States, 123 F. Supp. 435 (M. D. Georgia 1954)	23
United Nations Korean Reconstruction Agency v. Glass Production Methods, Inc., 143 F. Supp. 248 (S. D. N. Y. 1956)	23
United States v. CIO, 335 U. S. 106 (1948)	16
United States v. 11 Cases, 94 F. Supp. 925 (D. Ore. 1950)	15
United States v. 74 Cases, 55 F. Supp. 745 (W. D. S. C. 1944)	15
United States v. Shubert, et al., United States District Court for the Southern District of New York, Civil Action No. 56-72	4
Untersinger v. United States, 181 F. 2d 953 (2nd Cir. 1950)	23
William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738 (3rd Cir. 1945), cert. den. 334 U. S. 811 (1948)	3
William Goldman Theatres, Inc. v. Loew's, Inc., 69 F. Supp. 103 (E. D. Pa. 1946), petition to file bill of review denied, 163 F. 2d 241 (3rd Cir. 1947), aff'd 164 F. 2d 1021 (3rd Cir. 1948)	3, 4
Wilt v. Smack, 147 F. Supp. 700 (E. D. Pa. 1957)	23

STATUTES AND AUTHORITIES CITED.

	Page
Clayton Act:	
Section 4, 15 U. S. C. § 15	22
Section 12, 15 U. S. C. § 22	4, 5, 22, 23, 25
Federal Rules of Civil Procedure:	
Rule 4(d)(1)	23
Rule 4(d)(3)	23
Rule 4(d)(4)	20
Rule 4(d)(7)	23
Rule 54(b)	7
Interlocutory Appeals Act, 28 U. S. C. § 1292(b)	7
Judicial Code:	
Section 1404(a), 28 U. S. C. § 1404(a)	2, 9, 11, 15
Section 1406(a), 28 U. S. C. § 1406(a)	2, 9-11, 13-14, 17-20, 22-26
1 Moore, Federal Practice, ¶ 0.145 [3.-1], p. 1756 (2d ed. 1960)	13
1 Moore, Federal Practice, ¶ 0.146[4], p. 1906 (2d ed. 1960)	17
Moore's Commentary on the Judicial Code 195	15
Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949)	18
Sherman Act:	
Section 1, 15 U. S. C. § 1	4
Section 2, 15 U. S. C. § 2	4
28 U. S. C. § 1391(a), (b), (c)	22

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 101.

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

OPINIONS BELOW.

The majority and dissenting opinions of the Court of Appeals below (R. 103-20) are reported at 288 F. 2d 579. The opinion of the district court below (R. 60-66) is reported at 175 F. Supp. 793. The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 25-45) is reported at 169 F. Supp. 677.

QUESTION PRESENTED.

Does Section 1406(a) of the Judicial Code empower a district court to transfer a private antitrust action to another district when the transferor court lacks personal jurisdiction over the defendants?

STATUTE SOUGHT TO BE INVOKED.

Petitioner seeks to invoke Section 1406(a) of the Judicial Code, 28 U. S. C. § 1406(a), in support of its contention that a district court has the power to transfer a private antitrust action to another district when the transferor court lacks personal jurisdiction over the defendants. Section 1406(a) provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

COUNTER STATEMENT OF THE CASE.

These are two of eight private antitrust actions which have been instituted by petitioner against a total of fourteen corporate and individual defendants, including respondents Select Operating Corporation and United Booking Office, Inc., a dissolved corporation, under Sections 1 and 2 of the Sherman Act, in the United States District Courts for the Eastern District of Pennsylvania and the Southern District of New York. Each of the causes of action alleged in each of the complaints [1] or amended complaints are identical.[2]

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1. Four of the fourteen complaints, amended complaints or second amended complaints which have been filed at various times in the eight actions are reproduced in the Record by designation of petitioner (R. 13-17; R. 21-25; R. 47-53; R. 53-59).

2. The eight actions (some of which have been consolidated for certain purposes) including the district court in which they were

Following the decision of *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F. 2d 738 (3rd Cir. 1945), *cert. den.* 334 U. S. 811 (1948) in which William Goldman Theatres, Inc.,[3] as lessee of Philadelphia's Erlanger Theatre was accorded the right to exhibit first-run motion pictures at the Erlanger,[4] William Goldman Theatres, Inc. acquired and successfully operated three down-town first-run motion picture theatres and failed to exhibit any of such films at the

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instituted, the civil action number by which they are designated and the number of defendants named in each are as follows:

	Court	Civil Action No.	Individual and/or Fiduciary Defendants	Corporate Defendants
(a)	E.D Pa.	21506	6	4
(b)	E.D.Pa.	22092	7	6
(c)*	S.D.N.Y.	144-243	4	2
(d)*	S.D.N.Y.	144-244	4	2
(e)**	S.D.N.Y.	149-349	2	2
(f)***	S.D.N.Y.	60-4046	2	2
(g)***	S.D.N.Y.	60-4047	5	2
(h)***	E.D.Pa.	28721	3	3

* Denotes one of the two instant actions.

** Timely demands for jury trials were made in all of the actions except Civil Action No. 149-349.

*** Denotes an action which subsequently was dismissed by stipulation pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure and the complaint in which was thereby deemed to have been served as a supplemental complaint pursuant to Rule 15(d) in one or more of the previously pending actions.

3. All the stock of William Goldman Theatres, Inc. was and is owned or controlled by Mr. William Goldman who is the sole shareholder of petitioner.

4. The Erlanger was there described as "suitable for profitable exhibition of first-class feature motion pictures on first-run in competition with the theatres" operated by the exhibitor defendants. 150 F. 2d at 742. In addition to injunctive relief, the plaintiff was awarded $375,000 treble damages and an attorney's fee. *William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103 (E. D. Pa. 1946), *petition to file bill of review denied*, 163 F. 2d 241 (3rd Cir. 1947), *aff'd* 164 F. 2d 1021 (3rd Cir. 1948).

Erlanger.[5] Thereafter, on February 21, 1950, the United States of America filed a civil antitrust action charging numerous individual and corporate defendants, including respondent United Booking Office, Inc. with violations of Sections 1 and 2 of the Sherman Act in *United States v. Shubert, et al.*, United States District Court for the Southern District of New York, Civil Action No. 56-72.[6] On September 1, 1950, approximately six and one-half months after the commencement of *United States v. Shubert*, William Goldman Theatres, Inc., cancelled its lease to the Erlanger and on the same date petitioner by lease acquired the right to operate the Erlanger. On October 17, 1956, eight months after the entry of a Consent Decree [7] in *United States v. Shubert*, petitioner filed one of the instant actions, complaining that defendants, including respondents, had deprived petitioner of its ability to acquire legitimate theatrical attractions for presentation at the Erlanger in violation of the antitrust laws.[8]

After an unsuccessful attempt to make effective service upon respondents in the Eastern District of Pennsylvania,[9] petitioner sought to invoke Section 12 of the Clayton Act,

5. *William Goldman Theatres, Inc. v. Loew's, Inc.*, 163 F. 2d 241 (3rd Cir. 1947).

6. Respondent Select Operating Corporation was not a party to that litigation.

7. The Consent Decree was entered before any testimony had been taken.

8. On February 18, 1957 petitioner instituted the second of the instant actions which differed from the first only to the extent that the second added certain defendants and sought to extend the period for which damages were claimed. At the times when each of the actions was commenced, each of the defendants was subject to suit under the antitrust laws in the Southern District of New York, but only three of the corporate and three of the individual defendants were or have been held to have been amenable to suit in the Eastern District of Pennsylvania. See *Goldlawr v. Shubert*, 169 F. Supp. 677 (E. D. Pa. 1958) (R. 25).

9. Although petitioner now states that "service was originally made upon all defendants" in Philadelphia (Petitioner's Brief p. 3), petitioner has never contended, nor does it now contend, that the pur-

15 U. S. C. § 22, and caused a purported service of the summonses and complaints in both actions to be made upon respondents Select Operating Corporation and United Booking Office, Inc. in the Southern District of New York. Thereafter, respondents and others filed timely motions to dismiss the actions for lack of jurisdiction over their persons, to dismiss for improper venue and to quash the returns of service.

On December 22, 1958, the District Court for the Eastern District of Pennsylvania, Kraft, J., rendered an opinion (R. 25-45) in which the motions of the corporate respondents to dismiss for improper venue were granted on the ground that neither was an inhabitant, or was found or transacted business in the Eastern District of Pennsylvania within the meaning of Section 12 of the Clayton Act.[10] Before orders were entered in accordance with the opinion, however, petitioner filed a motion to transfer the actions to the District Court for the Southern District of New York. On March 3, 1959, "conformably to 28 U. S. C. A. § 1406(a)" (R. 46), the District Court for the Eastern District of Pennsylvania ordered the actions transferred as to respondents and others[11] to the District Court for the Southern District

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ported service of process which petitioner attempted to make upon respondents in the Eastern District of Pennsylvania was effective.

Moreover, petitioner acknowledges the fact that the District Court for the Eastern District of Pennsylvania lacked jurisdiction over the persons of respondents in its statement of the Question Presented both in its Petition and Brief and accordingly is foreclosed from asserting any contrary contention at this time.

10. At the same time, motions to dismiss for lack of personal jurisdiction, improper venue and to quash returns of service were denied with respect to J. J. Shubert, John Shubert and Select Theatres Corporation (the parent corporation of respondent Select Operating Corporation) as to whom and Lawrence Shubert Lawrence, Modern Theatre Corporation, Barrymore Theatre Corporation and L. A. B. Amusement Corporation, petitioner's actions presently are pending in the Eastern District of Pennsylvania.

11. In addition to respondents, the action was transferred as to defendants Sylvia W. Golde, Milton Shubert and William Klein.

of New York (R. 46-47), without determining whether the Pennsylvania court had jurisdiction over the persons of respondents.

Immediately following the transfer, respondents filed motions to dismiss the transferred actions in the district court below on the grounds that the transfers were invalid, improper and without statutory sanction. On August 10, 1959, the district court below, Palmieri, J., rendered an opinion (R. 60-66) holding that the extraterritorial service of process which petitioner caused to be made in New York was insufficient to subject respondents to the jurisdiction of the District Court for the Eastern District of Pennsylvania because Section 12 of the Clayton Act authorizes such service only when venue is properly laid in the district in which suit is commenced.[12]

Since the transferor court lacked jurisdiction over the persons of respondents, the district court below held that the transfer was invalid as to respondents because Section 1406(a) of the Judicial Code does not allow the transfer of a civil action to another district when the transferor court lacks personal jurisdiction over the defendants. Because the transferor court had already held that petitioner could not proceed in the Eastern District of Pennsylvania, the district court below directed that as to respondents[13] the

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12. To the same effect is *Bruner v. Republic Acceptance Corporation*, 191 F. Supp. 200, 203 (E. D. Ark. W. D. 1961). Petitioner did not challenge in the court below (see R. 107) or in its Petition, nor does petitioner now challenge the holding of the district court below that the extraterritorial service of process upon respondents in the Southern District of New York was insufficient to subject them to the jurisdiction of the Pennsylvania court. Accordingly, petitioner has conceded that the District Court for the Eastern District of Pennsylvania never acquired jurisdiction over the persons of respondents.

13. The remaining defendants as to whom the actions were transferred filed answers to the complaints before attempting to challenge the transfer. Judge Palmieri subsequently ruled that those defendants, unlike respondents, had waived the right to contest the transfer by filing answers. *Goldlawr v. Shubert*, 3 Fed. Rules Serv.

actions be dismissed [14] rather than remanded to the transferor district.

On February 21, 1961, the court below (Moore, J., Waterman, J., with Hincks, J. dissenting) affirmed the deci-

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2d, Case 3.2 at p. 35 (S. D. N. Y. 1960). As a result, the actions presently are pending as to the remaining defendants in the district court below.

14. On September 1, 1959, Judge Palmieri entered an order dismissing the actions as to respondents which expressly directed that "there is no just reason for delay and this Court directs the entry of judgment in favor of said Select Operating Corporation, United Booking Office, Inc., and Marcus Heiman" in conformity with Federal Rule 54(b) (R. 96-97). On September 25, 1959, petitioner filed a notice of appeal to the court below, and on November 30, 1959, respondents filed a motion to dismiss the appeal on the ground that the order of the district court below was interlocutory and not appealable.

On December 29, 1959, the court below (Lumbard, C. J., Swan, J., and Friendly, J.) held (R. 98-100) that the order was not appealable because an order directing dismissal of one or more, but less than all, of multiple defendants jointly charged, does not constitute "the entry of a final judgment upon one or more but less than all of the claims" presented in a multiple claims action within the meaning of Rule 54(b).*

On January 11, 1960, petitioner filed a petition for rehearing in the court below and in the alternative petitioned for amendment of the court's order to permit petitioner the right to appeal *nunc pro tunc*, under the Interlocutory Appeals Act, 28 U. S. C. § 1292(b).

On January 18, 1960, the court below denied the petition for rehearing, but vacated Judge Palmieri's order of September 1, 1959, "for the sole purpose of permitting him to 'enter a fresh decree' in which he may include the statement described in 28 U. S. C. § 1292(b) if in his full discretion he determines that such a statement is here justified" (R. 101-102).

On January 27, 1960, Judge Palmieri entered an order which included the statement contemplated by the Interlocutory Appeals Act (R. 66-67), and on February 2, 1960, petitioner filed an application in the court below for leave to take an interlocutory appeal. On March 7, 1960, the court below (Lumbard, C. J., Waterman, J., Moore, J., and Friendly, J., with Clark, J., dissenting) granted petitioner's application without opinion.

* By order dated April 17, 1961, this Court amended Rule 54(b) to permit appeals from orders dismissing one or more but less than all defendants in multiple defendant actions.

sion of the district court below holding that Section 1406(a) does not permit the transfer of an action to another district where the transferor court lacks jurisdiction over the persons of defendants (R. 103-120).

Certiorari was granted by this Court on October 9, 1961 (R. 121).

SUMMARY OF ARGUMENT.

The decisions below that Section 1406 does not permit transfer in the absence of personal jurisdiction are correct because the construction adopted below is the only one sanctioned by the statute.

1. Petitioner claims that although personal jurisdiction is a prerequisite to transfer when venue is proper but inconvenient under Section 1404, personal jurisdiction is not such a condition precedent to transfer under 1406. Petitioner's contention is logically inconsistent and imputes irrationality to Congress because both statutes which were enacted at the same time, are equally silent with respect to the requirement of personal jurisdiction. Congress would not have made personal jurisdiction prerequisite to transfer under 1404 when venue is inconvenient but proper and not have made such jurisdiction prerequisite to transfer under 1406 when venue is entirely defective. Nor would Congress, had it intended to authorize transfer in the absence of personal jurisdiction, have made such power turn on the impropriety of venue in the transferor district. Petitioner's contention imputes just such an intention to Congress since petitioner contends that transfers in the absence of personal jurisdiction are authorized only by 1406 which is inoperative unless venue is improper.

2. In addition, petitioner's contention must be rejected because Section 1406 is in the nature of a jurisdictional statute and as such must be strictly construed. Moreover, this Court's decision in *Hoffman v. Blaski*, 363 U. S. 335 (1960), which involved 1404, establishes a rule of strict construction of the transfer statutes and is entirely dispositive of petitioner's contention here.

3. Petitioner's contention also is meritless because it seeks to attribute an intention to Congress which flies in the face of the statute's legislative history.

4. The decisions upon which petitioner relies are either inapplicable to the transfer of civil antitrust actions or the proposition for which they are cited was not in issue in those cases.

5. The decisions below impose no restrictions upon the statute and do not, as the dissenting Judge below claimed make it applicable only when there is "no occasion for its use" because transfers under 1406 have been ordered when the transferor court had personal jurisdiction over the defendants but venue was improper, in a wide variety of types of cases. Nor should the decisions below be overturned, as petitioner contends, because of any "hardship" on the petitioner since such "hardship", if any, is of petitioner's own manufacture.

ARGUMENT.

The decisions below that Section 1406(a) does not permit transfer when the transferor court lacks personal jurisdiction are claimed by petitioner to "impose an unwarranted restriction upon the application of Section 1406(a)" [15] and petitioner urges that the "restriction" so imposed "is unduly burdensome".[16] Respondents submit that the decisions below are correct and that the holdings impose no "restriction" upon the statute nor are they "burdensome". On the contrary, respondents submit that the construction adopted by the courts below is the only one sanctioned by the statute.

This Court is asked merely to determine whether a statute which authorizes transfer of "a case laying venue in the wrong division or district" can be utilized to sanction the transfer of an action in order to cure another jurisdictional defect not mentioned or alluded to in the statute. This Court is not asked to determine either the constitutionality, propriety or desirability of a statute which purports to authorize transfer in the absence of personal jurisdiction. The only question before this Court is whether Congress has so provided in Section 1406(a) of the Judicial Code. Respondents submit that it has not.

I. The Construction of Section 1406(a) for Which Petitioner Contends Imputes Irrationality to Congress.

Had Congress sought to implement a policy favoring transfer in the absence of personal jurisdiction, respondents submit that it would not have chosen Section 1406 as its vehicle. Analysis of the transfer statutes, 28 U. S. C. §§ 1404(a), 1406(a), and of petitioner's contentions demonstrates that petitioner's attribution of such a purpose to Congress in enacting Section 1406, imputes irrationality

15. Petitioner's Brief, p. 6.

16. Id., p. 11.

to our national legislature. As a result, it is manifest that the construction which petitioner urges this Court to adopt must be rejected.

Section 1404 which is, as the court below remarked, "a legislative sibling to Section 1406" (R. 110), creates the power to transfer an action properly commenced in the transferor district when that forum is inconvenient. And Section 1406 authorizes transfer when venue is improperly laid in the transferor district. But neither statute purports to sanction transfer when the transferor court is without personal jurisdiction.

In *Hoffman v. Blaski*, 363 U. S. 335 (1960), which involved Section 1404, this Court refused to construe the phrase authorizing transfer of an action "to any other district or division where it might have been brought" to sanction a transfer otherwise "in the interest of justice" to a district in which the defendant could not have been sued absent his waiver of jurisdictional defenses. There this Court rejected an expansive construction of the express language of the statute notwithstanding its admittedly remedial purpose and notwithstanding the fact that the construction there urged was at least arguable.[17] Here, the construction of Section 1406 for which petitioner contends has no statutory language for its foundation. Rather, petitioner's contention necessarily depends upon Congress' failure to make personal jurisdiction an express condition precedent to transfer.

Since Section 1404 is likewise silent with respect to whether personal jurisdiction is prerequisite to transfer, lack of personal jurisdiction, by petitioner's reasoning, should not bar transfer to a more convenient forum under that statute. Petitioner, however, contends that such personal jurisdiction is a condition precedent to transfer under 1404 because that statute "is a codification of the common

17. See the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Harlan and Mr. Justice Brennan joined, in *Sullivan v. Behimer*, 363 U. S. at 351-69.

law doctrine of *forum non conveniens*, and in applying this doctrine it has been an historic requirement that the transferring court have personal jurisdiction over the defendant."[18] Can it be, as petitioner claims, that personal jurisdiction is a prerequisite to transfer under one but not the other of sibling statutes which are equally silent with respect to personal jurisdiction? Surely the absence of personal jurisdiction as a condition precedent to transfer under 1406 cannot be made to depend upon the fact that 1404 is the legislative descendant of a common law ancestor whereas 1406 is without such a progenitor. Why would Congress make personal jurisdiction a condition precedent to transfer when venue is merely inconvenient but proper, and not make personal jurisdiction such a condition precedent when venue is entirely defective?

Conversely, if Congress in enacting the transfer statutes intended to permit transfer when the transferor court lacked jurisdiction, why would it require that venue be improper as a condition precedent to such a transfer? If personal jurisdiction is a prerequisite to transfer under 1404 but not under 1406, as petitioner contends, it is clear that transfer to cure a defect of personal jurisdiction could be made only under the latter statute. But 1406 is inoperative unless venue is *improper* in the transferor district.[19] Accordingly no transfer to cure a defect of personal jurisdiction would be possible unless venue was also defective. Had Congress intended to permit transfer in the absence of personal jurisdiction, as petitioner contends, would Congress choose to implement such a policy by enacting a statute under which the power of transfer turns upon the impropriety of venue in the transferor district? Petitioner's contention imputes to Congress just such an intention.

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18. Petitioner's Brief, p. 11. See also 1 *Moore, Federal Practice*, ¶ 0.145 [3.-1], p. 1756 (2d ed. 1960); *Foster-Milburn Co. v. Knight*, 181 F.2d 949, 952-53 (2nd Cir. 1950).

19. *Riley v. Union Pacific R. Co.*, 177 F.2d 673 (7th Cir. 1949), *cert. den.* 338 U. S. 911 (1950).

Respondents can conceive of no reason why the propriety or impropriety of venue can or should have any bearing on the power of transfer in the absence of personal jurisdiction. Respondents submit that the only construction of 1406 which is consistent with Congressional rationality is the one adopted by the courts below and by the Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc.*, 286 F.2d 527 (1961). For this reason alone the decisions below should be affirmed.

II. Applicable Decisions of This Court Require That Section 1406(a) Be Strictly Construed.

Entirely apart from the logical inconsistency of petitioner's position, its contention must be rejected because Section 1406(a) must be strictly construed. Petitioner's sole argument is that "Section 1406(a) is a remedial statute and as such should be broadly construed."[20] Petitioner's plea is without merit, because notwithstanding its remedial purpose, Section 1406 is in the nature of a jurisdictional statute and as such must be strictly construed.

The principle that "Courts created by statute can have no jurisdiction but such as the statute confers"[21] is one of long standing. And since "the jurisdiction of . . . [a federal court] is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. . . ." *Hanford v. Davies*, 163 U. S. 273, 279 (1896); *Anderson v. Watt*, 138 U. S. 694, 702 (1891).

A similar presumption arises with respect to the transfer statutes because the power of transfer, unlike many judicial prerogatives, does not inhere in the United States district courts. Prior to 1948, no district court possessed the power or right to transfer an action from one district

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20. Petitioner's Brief, p. 6.

21. *Sheldon v. Sill*, 49 U. S. (8 How.) 440, 448 (1850).

to another for any reason.[22] But in that year Congress "radically altered the prior law"[23] which required dismissal when venue was defective,[24] by authorizing in Section 1406(a) the transfer of actions in which venue was improperly laid.[25] And it is clear that the transfer statutes must be construed consistently with principles applicable to jurisdictional provisions, because

> "A District Court is a separate entity. No District Court has jurisdiction crossing a state line. By virtue of these limitations, the transfer of any cause from one district to another is a question of power. No District Court has any such inherent authority. There must be an express statutory grant as a condition precedent to initiation of the transfer, and every essential factor must be present to confer jurisdiction on the court to which the case is sent."[26]

As the court pertinently observed with respect to the transfer statutes in *United States v. 11 Cases*, 94 F. Supp. 925, 927 (D. Ore. 1950): "the power of transfer is jurisdictional and may only be exercised in strict accordance with the statutory grant."

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22. *Kibler v. Transcontinental & Western Air*, 63 F. Supp. 724 (E. D. N. Y. 1945); *Brown v. Heinen*, 61 F. Supp. 563 (D. Minn. 1945); *United States v. 74 Cases*, 55 F. Supp. 745 (W. D. S. C. 1944); *Billings Utility Co. v. Federal Reserve Bank of Minneapolis*, 40 F. Supp. 309 (D. Mont. 1941). See also *In re Associated Gas & Electric Co.*, 83 F. 2d 734 (2nd Cir. 1936).

23. Moore's Commentary on the Judicial Code 195.

24. *Camp v. Gress*, 250 U. S. 308, 316 (1919).

25. Section 1404(a), which was enacted at the same time, authorizes transfer, instead of dismissal, when plaintiff brings suit in a forum which is inconvenient. Under prior law, the plaintiff suffered dismissal under the doctrine of *forum non conveniens* when suit was commenced in such a district. See *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955).

26. *Felchlin v. American Smelting and Refining Company*, 136 F. Supp. 577, 581 (S. D. Cal. 1955).

Moreover, respondents submit that the decision of this Court in *Hoffman v. Blaski*, 363 U. S. 335 (1960) establishes a rule of strict construction of the transfer statutes. There, as here, this Court was asked to adopt a broad construction of a transfer statute. There, as here, "petitioner's 'thesis' and sole claim is that . . . [the statute] . . . , being remedial . . . [it] should be broadly construed. . . ." 363 U. S. at 342. There, as here, it was urged that the Court should adopt a broad construction of the statute since by its terms transfer can be ordered only if it be "in the interest of justice", and for that reason no possible abuse or prejudice could result from the construction urged.[27] There, as respondents submit this Court should do here, the broad construction urged was rejected.

Hoffman v. Blaski is entirely dispositive of petitioner's contention that the remedial purpose of Section 1406 requires or justifies the broad construction of that statute which it asks this Court to adopt. Section 1406(a) is in the nature of a jurisdictional statute and as such it should be strictly construed.[28] Respondents suggest that this Court be guided by the observations of the court below with respect to the proper construction of Section 1406(a).

> "The scope of judicial authority should not be lightly extended in the absence of a clear statutory

27. Petitioner here argues that since 1406 transfers must be "in the interest of justice" no "harassment of defendants" or other prejudice will result from the construction which it advances, and, for that reason, the Court should allow transfer in absence of personal jurisdiction. Petitioner's Brief, pp. 10-11. Significantly, the same argument was advanced in *Hoffman v. Blaski* and was there rejected. See the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Harlan and Mr. Justice Brennan joined, in *Sullivan v. Behimer*, 363 U. S. 351-69, at pp. 361-62.

28. This Court should not construe 1406 to permit transfer in the absence of personal jurisdiction for the additional reason that such a construction could raise serious constitutional questions under the due process clause. And it is well settled that this Court will, whenever possible, "give a statute an allowable construction that fairly avoids a constitutional issue." *United States v. CIO*, 335 U. S. 106, 129 (1948).

basis. While not relevant to the present appeal in its actual holding, *Miner v. Atlass*, 363 U. S. 641 (1960), is nevertheless a warning that federal courts should proceed with caution when considering the merit of implying basic procedural innovations. 'Although a liberal transfer statute might be wise, such a change is more properly a subject for legislative action after 'mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration [legislative] affords.' *Miner v. Atlass, supra*, p. 650."[29]

III. The Legislative History of the Statute Demonstrates That Personal Jurisdiction Is a Prerequisite to Transfer.

Not only does petitioner's contention impute irrationality to Congress and offend traditional, well-established principles of judicial construction of jurisdictional statutes, but petitioner seeks to attribute to Congress an intention which flies in the face of the statute's legislative history.

As initially enacted in 1948, Section 1406(a) required transfer when venue was improperly laid. It was recognized, however, that the provision for mandatory transfer might be subject to abuse. To avoid this possibility, Congress amended Section 1406(a) in 1949 to make transfer optional in the discretion of the district court "to prevent a plaintiff from deliberately bringing suit in the wrong district in order to effect service of process on the defendant and after perfecting service, obtaining a transfer of the case to the proper district."[30] The Senate Report states:

> "It is thought that this provision may be subject to abuse in that a plaintiff might deliberately bring a suit in the wrong division or district *where he could get service on the defendant*, and when the question

29. R. 109-110.

30. 1 *Moore, Federal Practice*, ¶ 0.146[4], p. 1906 (2d ed. 1960).

> of venue is raised the court is required to transfer the case to the court where it 'could have been brought.' *However, in the meantime, service has been perfected on a defendant in the wrong venue, and it will carry over into the new (and proper) venue.*" (Emphasis added.) [31]

Implicit in the foregoing statement is Congress' recognition that Section 1406(a) is inoperative unless plaintiff brings suit in a district "where he could get service on the defendant" and that it is a prerequisite to transfer that "service has been perfected on defendant in the wrong venue. . . ." Accordingly, it is clear that Congress did not intend Section 1406(a) to authorize transfer when the transferor court lacks personal jurisdiction over the defendant.

The Court of Appeals for the Third Circuit agrees that in enacting Section 1406(a), Congress did not intend to authorize transfer in the absence of personal jurisdiction, *Hohensee v. News Syndicate, Inc.*, 286 F. 2d 527, 529-30 (3rd Cir. 1961):

> ". . . The sole purpose of this section [1406(a)] as well as its companion, 28 U. S. C. § 1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. Venue has to do with determining the proper place where litigation may proceed. It has nothing to do with determining the extent of the area in which a party defendant may be properly served. The appellant here is, in effect, attempting to turn a venue provision into a device for including New York within the area where appellee can be properly served under Rule 4(d) of the Federal Rules of Civil Procedure, 28 U. S. C. A., in an action commenced in

31. Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949).

Pennsylvania. We are satisfied that Section 1406 was never intended to serve as a means of avoiding the consequences of a failure to perfect service of process. It would take a clear congressional mandate for this court to allow that section to be used as a shorthand method for assisting a party to effect jurisdiction of the person."

IV. The Decisions Upon Which Petitioner Relies Are Either Inapplicable or the Proposition for Which They Are Cited Was Not in Issue.

Petitioner asserts that the construction of Section 1406(a) which it urges this Court to adopt is supported by the decisions of the Courts of Appeals for the Fourth, Ninth and District of Columbia Circuits.[32] Respondents submit that the decisions relied upon by petitioner as impeaching the holdings below and the same holding of the Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc., supra,* are either inapplicable or the proposition for which they are cited by the petitioner was not in issue or was conceded without argument in those cases.

Petitioner's citation of *Orion Shipping and Trading Company v. United States,* 247 F. 2d 755 (9th Cir. 1957), is typical. *Orion* was an appeal from the dismissal of third party proceedings instituted by a ship owner against the United States. The United States claimed that venue was improperly laid since Orion did not reside or have its principal place of business in the district in which suit was instituted. The Court of Appeals held that the dismissal was erroneous and remanded with directions to transfer the action pursuant to Section 1406(a). *Orion* in no respect involved the power of the district court to transfer in the absence of personal jurisdiction. There, the transferor court had jurisdiction over the person because the United

32. Petitioner's Brief, p. 7.

States,[33] the third party defendant, had "appeared and answered." 247 F. 2d at 758.

Petitioner likewise seeks to create the impression that *Amerio Contact Plate Freezers, Inc. v. Knowles*, 274 F. 2d 590 (D. C. Cir. 1960), held that Section 1406(a) authorizes transfer in the absence of personal jurisdiction. Although the language relied upon by petitioner appears to support petitioner's contention, the proposition for which it is cited was there conceded without argument. In *Amerio*, the plaintiff brought suit in a district in which venue was improperly laid and failed to make proper service of process on the defendant. The lower court granted defendant's motion to dismiss for lack of jurisdiction and denied plaintiff's motion to transfer pursuant to Section 1406(a). On appeal, appellee, the defendant below, argued merely that the transferor court lacked jurisdiction over *the subject matter of the action*, and that, as a result, the district court was powerless to order the transfer. In fact, the appellee expressly conceded that the transferor court's lack of personal jurisdiction over the appellee was no bar to the requested transfer.

> "Appellant relies on *Schiller v. Mit-Clip Co.* . . . as standing for the proposition that a civil action may be transferred to another district to correct venue where the transferring district has jurisdiction of the subject matter of the action, but not of the person of the defendant. *We do not disagree with the statement of the rule.* . . .
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> "It is appellee's position that . . . special jurisdictional prerequisites . . . were not met in this case and that because of this fact the District Court for the District of Columbia *obtained no jurisdiction over the*

33. Personal jurisdiction can be acquired over the United States in any judicial district in which it is sued. Rule 4(d)(4), Federal Rules of Civil Procedure.

subject matter of this action. It accordingly properly refused to transfer the case and dismissed the action." (Emphasis added.) [34]

Accordingly, petitioner's reliance upon *Amerio* is unwarranted because the proposition for which petitioner cites *Amerio* was there conceded without argument. And in *Hayes v. Livermont*, 279 F. 2d 818 (D. C. Cir. 1960), the question of whether a district court has the power to transfer in the absence of personal jurisdiction does not appear to have been in issue.

Internatio-Rotterdam, Inc. v. Thomsen, 218 F. 2d 514 (4th Cir. 1955), also relied on by petitioner, was an admiralty action. As Judge Staley, speaking for the court in *Hohensee v. News Syndicate, Inc., supra*, stated (p. 530, n. 6):

> ". . . Admiralty cases . . . are inapposite for the reasons succinctly stated in another admiralty case appellant cites, *Internatio-Rotterdam, Inc. v. Thomsen*, 4 Cir. 1955, 218 F. 2d 514, 515, where Judge Parker said:
>
> " 'As the suits were in admiralty, they might have been instituted in any district court of the United States. * * * It is proper to institute a suit in admiralty in a district in which there is no person who can be served with process and no property which can be seized, if it is made to appear that property which can be seized under process therein is expected to be within the district shortly * * *.' "

Moreover, as Judge Parker noted in *Internatio*, venue is a concept foreign to admiralty (218 F. 2d at 516, n. 1):

> "A suit in admiralty must be distinguished in this respect [institution of suit] from a civil action based

34. Appellee's Brief on Appeal in *Amerio Contact Plate Freezers, Inc. v. Knowles*, in the United States Court of Appeals for the District of Columbia Circuit, No. 15,150, pp. 12-13, 15.

on diversity of citizenship in which venue is limited by statute."

Accordingly, since the venue of antitrust suits, like diversity actions, is limited by statute,[35] *Internatio* does not sanction the transfer of a civil antitrust action in which venue is so limited.

Respondents submit that the decisions relied upon by petitioner do not support the construction of the statute for which petitioner contends.

V. The Decisions Below Impose No Restrictions Upon the Statute Nor Hardship Upon Petitioner.

Petitioner's characterization of the decisions below as imposing "restrictions" upon Section 1406 obviously presupposes the validity of petitioner's construction of the statute. But entirely apart from petitioner's presumption, the decisions below do not circumscribe the operation of the statute.

Although generalization may be difficult, requirements with respect to the laying of venue usually are more strict than those with respect to personal jurisdiction. Thus when federal jurisdiction is based upon diversity of citizenship, venue must be laid either in the district of all of the plaintiffs' or all of the defendants' residence. 28 U. S. C. § 1391(a). And when jurisdiction is predicated upon the existence of a federal question, venue is proper only in the district of the residence of all of the defendants. 28 U. S. C. § 1391(b).[36] But in either case requirements with respect to personal jurisdiction can be satisfied irrespective of the residence of the defendant if service is made upon an

35. Clayton Act, Sections 4 and 12, 15 U. S. C. §§ 15, 22.

36. This is true except where, as here, venue is governed by statutory provisions peculiar to a specific federal statutory cause of action. See, for example, the statutes cited at page 12, footnote 15, of petitioner's Brief. And when the defendant is a corporation, the venue of diversity and federal question cases may be laid in any district in which the corporation is incorporated or is "licensed to do business or is doing business. . . ." 28 U. S. C. § 1391(c).

individual personally wherever he may be found[37] or upon a corporation by serving "an officer, a managing or general agent, or . . . any other agent authorized by appointment or law to receive service of process . . ."[38] Accordingly, it is entirely possible that suit can be instituted in a district in which service can be perfected, but in which venue would be improperly laid.[39] As a result, the construction of 1406 adopted below does not make it available, as the dissenting Judge claimed, "only when there . . . [is] . . . no occasion for its use"[40] (R. 118).

Petitioner contends that the decisions below must be reversed else 1406 will never be applicable to the transfer of

37. Rule 4(d)(1), Federal Rules of Civil Procedure.

38. Rule 4(d)(3), Federal Rules of Civil Procedure. In addition, individuals and corporations can be served in any manner authorized by state practice. Rule 4(d)(7), Federal Rules of Civil Procedure. And with respect to several types of federal question cases, the appropriate method of service is prescribed by statute. See, for example, Section 12 of the Clayton Act, 15 U. S. C. § 22.

39. One of the most typical examples of suits in which service frequently is perfected in the district in which suit is instituted but in which venue is improper are diversity actions where service is made pursuant to state statutes which authorize service upon the Secretary of State or some other state official by virtue of the doing of an act within the state, when neither party is a resident of that state. See, for example, *Olberding v. Illinois Central R. Co.*, 346 U. S. 338 (1953).

40. On the contrary, transfers have been ordered in many cases under Section 1406(a) where the transferor court had personal jurisdiction over the defendants but where venue was improper. Representative reported decisions in a wide variety of types of cases include: *Orion Shipping and Trading Company v. United States*, 247 F. 2d 755 (9th Cir. 1957) (see textual discussion of *Orion* at pp. 19-20 *supra* and note 33 *supra*); *Untersinger v. United States*, 181 F. 2d 953 (2nd Cir. 1950); *Gold v. Griffith*, 190 F. Supp. 482 (N. D. Ind. 1960); *Dennis v. Galvanek*, 171 F. Supp. 115 (M. D. Pa. 1959); *Jacobson v. Indianapolis Power & Light Company*, 163 F. Supp. 218 (N. D. Ind. 1958); *United Nations Korean Reconstruction Agency v. Glass Production Methods, Inc.*, 143 F. Supp. 248 (S. D. N. Y. 1956); *Sherck v. Hagan*, 135 F. Supp. 293 (D. N. D. 1955); *United Merchants & Manufacturers, Inc. v. United States*, 123 F. Supp. 435 (M. D. Georgia 1954); *Norris v. Yates*, 109 F. Supp. 436 (W. D. Pa. 1953); *Sullivan v. Kilgore Mfg. Co.*, 100 F. Supp. 983 (E. D. N. Y. 1951); *Squires v. The Ionian Leader*, 100 F. Supp. 829 (D. N. J. 1951). *Cf. Wilt v. Smack*, 147 F. Supp. 700 (E. D. Pa. 1957).

civil antitrust actions against corporate defendants. But since Congress in Section 12 of the Clayton Act [41] has laid the venue of private antitrust actions against corporate defendants in any district where the corporation transacts business and has authorized extraterritorial service of process upon such a defendant whenever venue is properly laid in the district in which the action is instituted, a private antitrust plaintiff can prosecute his action in any district in which a corporate defendant transacts business. As a result "a corporation could . . . be held to be transacting business, and venue [and personal jurisdiction] established, '—although not present by its agents carrying on business of such character and in such manner that it is "found" therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character.' " [42] Section 12 in permitting suits against corporate defendants wherever they "transact business" represents the fullest implementation of the Congressional policy to facilitate the private enforcement of the antitrust laws.

Petitioner cannot, therefore, urge an expansive construction of 1406 on the ground that to hold otherwise would frustrate Congressional policy because, whatever the construction adopted, 1406 is a statute of general application which cannot, for that reason, conflict with a Congressional policy which has been implemented by specific statute.

Petitioner's complaint that the decisions below frustrate the "Congressional policy . . . to facilitate the private antitrust suitor's prosecution of his claim against alleged antitrust violators" [43] obviously is directed to the deci-

41. Section 12 provides: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

42. *Goldlawr v. Shubert*, 169 F. Supp. 677 (E. D. Pa. 1958) (R. 25, at 27) quoting from *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 373 (1927).

43. Petitioner's Brief, p. 14.

sion of the district court below with respect to the scope of Section 12 of the Clayton Act rather than to the decisions below with respect to Section 1406 of Judicial Code. And as the court below observed, petitioner's "real difficulty here is that it has failed to meet the requirements"[44] of Section 12.

It is somewhat surprising that petitioner should urge that the decision below "unduly burdens"[45] petitioner, when petitioner has conceded its failure to comply with the provisions of the Clayton Act, which, unlike Section 1406(a), was expressly enacted to facilitate private enforcement of the antitrust laws. Accordingly, by urging an expansive construction of Section 1406, petitioner in effect seeks judicial amendment of Section 12 of the Clayton Act.

In addition, petitioner urges that the "hardship" of the holding below "is illustrated in the instant case."[46] Petitioner apparently contends that through no fault of its own, it will be deprived of the right to recover damages with respect to the "larger part" of its "claim"[47] against respondents Select Operating Corporation and United Booking Office, Inc.[48] if the decision below is affirmed. Not only is its contention irrelevant even if otherwise true, but petitioner does not disclose that despite a challenge to the court's jurisdiction made by respondents in 1956 in the Eastern District of Pennsylvania, petitioner did not take the precautionary step of preserving its rights under the statute of limitations by filing suit against respondents in the Southern District of New York until August 20, 1959, subsequent to the decision of the district court below. Petitioner could have avoided the claimed "hardship" resulting from the decisions below by the prompt prosecution of its claims in the Southern District of New York where re-

44. R. 114.
45. Petitioner's Brief, p. 15.
46. Id., p. 13.
47. Id., p. 14.
48. With respect to other suits which petitioner has instituted against other defendants to enforce the same "claim", see footnotes 2, 10, 11, *supra*.

spondents and all of the other defendants were amenable to suit, when alerted in 1956 of the jurisdictional defects attending the action instituted in Philadelphia. Accordingly, any "hardship" resulting from the decisions below is of petitioner's own manufacture.

CONCLUSION.

The decisions below that Section 1406(a) does not authorize transfer in the absence of personal jurisdiction are clearly correct. Petitioner's contention to the contrary imputes irrationality to Congress, violates applicable rules of construction of jurisdictional statutes and flies in the face of the statute's legislative history. The opinions relied upon by petitioner do not support the construction which it urges and the decisions below impose no restrictions upon the statute nor hardship upon petitioner.

For the foregoing reasons, the judgment of the Court of Appeals affirming the dismissal of the transferred actions as to respondents Select Operating Corporation and United Booking Office, Inc. by the district court below should be affirmed.

Respectfully submitted,

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